77-1236

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. [redacted]

GENERAL ATOMIC COMPANY,
Petitioner,

v.

THE HONORABLE EDWIN L. FELTER, JUDGE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

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The petitioner, General Atomic Company, respectfully prays that a writ of certiorari issue to review the order of the Supreme Court of New Mexico entered in this proceeding on January 11, 1978.

OPINIONS BELOW

The Supreme Court of New Mexico issued no opinion in denying petitioner's application for a writ of prohibition. Its order denying the writ appears as Appendix A hereto (p. 1a, *infra*). The trial judge, The Honorable Edwin L. Felter, whose order of November 18, 1977 was the subject of the request for a writ of prohibition, also issued no opinion. His challenged order appears as Appendix B (pp. 2a-5a, *infra*).

JURISDICTION

The order of the Supreme Court of New Mexico denying the petition for a writ of prohibition was issued on January 11, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). *See, e.g., Madruga* v. *Superior Court*, 346 U.S. 556 (1954); *Fisher* v. *District Court*, 424 U.S. 382 (1976).

QUESTIONS PRESENTED

1. Whether a State trial judge has jurisdiction to issue a discovery order requiring documents located in Canada to be produced in his court though such production violates Canadian criminal law and the judge's order is in direct conflict with formal Diplomatic Notes sent by the Government of Canada, or whether such judicial action interferes unconstitutionally with foreign affairs, which are reserved exclusively to the federal government.

2. Whether respondent is violating the "act of state" doctrine by overriding a criminal law enacted and enforced on Canadian soil by the Canadian Government and by adjudicating the legality of an international marketing arrangement sponsored, adopted and enforced on Canadian territory by the Government of Canada.

3. Whether respondent is violating the Due Process Clause by penalizing petitioner for the refusal of a nonparty Canadian corporation to violate the criminal law of Canada.

STATEMENT OF THE CASE

This petition concerns a "Canadian documents" order issued by respondent, the Honorable Edwin L. Felter, a New Mexico trial judge who is presiding over a major civil case now pending in the First Judicial District, Santa Fe County, New Mexico. The civil case, entitled *United Nuclear Corp.* v. *General Atomic Co.* (*"UNC* v. *GAC"*), No. 50827, involves more than seven hundred million dollars. The litigation has been described in detail in papers previously filed with this Court by GAC,[1] as well as in a Petition for Writ of Mandamus which is being filed today as a companion to this Petition for Writ of Certiorari.

This Court recently considered the validity of an earlier order which respondent had issued in this substantial litigation. The earlier order, issued on April 2, 1976, had enjoined GAC and its constituent partners from pursuing federal remedies, including the remedy of federal arbitration. On October 31, 1977, this Court determined that the earlier injunctive order was unconstitutional, and summarily reversed the judgment of the New Mexico Supreme Court affirming that order.[2] *General Atomic Co.* v. *Felter*, 98 S. Ct. 76 (1977). The accompanying Motion and supporting Petition for Writ of Mandamus relate to a new order by which respondent has partially reinstituted his prior illegal ban on seeking federal remedies and has thus unconstitutionally flouted this Court's decision. This Petition for Writ of Certiorari challenges a different unconstitutional order issued by respondent. The latter order, purportedly only a discovery order accompanied by a drastic sanction, exceeds respondent's constitutional jurisdiction. The order requires GAC to produce documents located in Canada even though (1) such documents are in the possession or custody of a Canadian corporation, Gulf Minerals Canada, Ltd ("GMCL"), (2) disclosure of the documents by GMCL would be a serious crime under Canadian law,

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[1] Petition for Writ of Certiorari, *General Atomic Co.* v. *Felter*, No. 76-385, 429 U.S. 973 (1976); Petition for Writ of Certiorari, *General Atomic Co.* v. *Felter*, No. 76-1640, 98 S. Ct. 76 (1977).

[2] The New Mexico Supreme Court had initially affirmed the order without opinion. This Court then granted a writ of certiorari, vacated the judgment below, and remanded to the New Mexico Supreme Court for a statement of whether the State court's affirmance rested on federal or state grounds. *General Atomic Co.* v. *Felter*, 429 U.S. 973 (1976). Only after the remand did the New Mexico Supreme Court write an opinion stating its grounds for affirmance. 90 N.M. 120 (1977). This Court then granted certiorari again and summarily reversed the New Mexico Supreme Court.

and (3) the Canadian Government has delivered formal diplomatic protests against the order.

1. The Framework of the Discovery Order

The litigation in the New Mexico court was instituted by UNC in late 1975 to rescind and invalidate a 1973 agreement which obligated UNC to supply uranium to GAC.[3] Various grounds were initially asserted by UNC in support of its claim of invalidity, but not until a few months before trial did UNC seriously contend that supposed participation in an alleged "international uranium cartel" was a part of the case. In August 1977, however, UNC made such an assertion, claiming that the participants in the alleged "international cartel" included, among others, GAC, Gulf Oil Corporation ("Gulf"), which owns one-half of GAC,[4] and Gulf Minerals Canada, Ltd. ("GMCL"), a Gulf subsidiary which is located and incorporated in Canada.

The alleged "international cartel" was in fact an international uranium marketing arrangement established and enforced by foreign governments, including the Government of Canada.[5] Between 1972 and 1975 the foreign

[3] Between 1966 and 1971, UNC entered agreements to supply uranium to various utility companies, including Duke Power, Commonwealth Edison, Detroit Edison, and Indiana and Michigan Electric Co. UNC's obligations to supply uranium under the agreements were subsequently assigned to GAC's predecessors, and ultimately to GAC. Concomitant with the first two assignments, UNC became obligated to supply the assignees with uranium which the assignees would then resupply to the utilities. Thus, the 1973 supply agreement discussed in the text is a contract under which UNC reaffirmed its obligation to supply uranium to an assignee which would resupply it to the utilities.

An amended complaint sought to rescind a 1974 agreement on primarily the same grounds as were asserted in regard to the 1973 contract.

[4] Scallop Nuclear, Inc. is the other constituent partner in GAC. There is no claim that Scallop was part of the alleged "international cartel" or possessed documents or information relating to the alleged "international cartel."

[5] Other participants included Australia, France and South Africa.

governments, together with foreign uranium producers, established price controls and marketing quotas for uranium sold elsewhere than in the United States. The foreign governments considered these steps to be necessary to protect their uranium industries against severe damage being caused by restrictive American trade practices. Paramount among such restrictive practices was an American embargo, instituted in 1966, against importing and enriching foreign uranium for use in the United States. The Government of Canada has stated, in several official diplomatic notes to the United States Government, App. C, pp. 6a-12a, *infra*, and in official statements of Canadian ministers, App. D, pp. 13a-25a, *infra*, that the international marketing arrangement was necessary to protect the Canadian uranium industry from severe harm or extinction.[6] It likewise has stated that American actions causing the harm were a violation of U.S. obligations under an international agreement, that the Government of Canada approved of the international marketing arrangement and was one of the leading governments involved in its organization, that the Canadian Government enforced the arrangement through the granting or withholding of export permits, and that the Government of Canada is offended by efforts to question the arrangement in American courts. (App. C, pp. 6a-12a and App. D, pp. 13a-25a, *infra*).

After UNC began seriously to contend that this international marketing arrangement violated the New Mexico Antitrust Act, N.M.S.A. §§ 49-1-1, *et seq.*, in August 1977 it sought to discover Canadian documents related to the international arrangement and located in the Canadian offices of GMCL. In opposing UNC's discovery request, GAC directed Judge Felter's attention to the Canadian Uranium Information Security Regulations,

[6] The Canadian uranium industry originally had been greatly expanded, at the express encouragement of the American government, to meet the needs of the United States market.

S.O.R. 76-644 (P.C. 1976-2368), which had been promulgated pursuant to Section 9 of Canada's Atomic Energy Control Act, R.S.C. 1970, c. A-19. (App. E, pp. 26a-27a, *infra.*) These regulations broadly prohibit the release or disclosure of any document relating to discussions or meetings, between 1972 and 1975, pertaining to the "production, import, export, transportation, refining, possession, ownership, use or sale of uranium or its derivatives or compounds" (App. E, pp. 26a-27a, *infra*). GAC pointed out that GMCL would violate Canadian law and subject itself to criminal prosecution if GMCL disclosed the documents pursuant to UNC's discovery request.

2. The Duquesne and Westinghouse Litigations

The question of producing Canadian documents relating to the international arrangement had previously arisen in two other cases. In *Duquesne Light Co., et al.* v. *Westinghouse Electric Corp.*, No. GD 75-23978 In Equity, Court of Common Pleas, Allegheny County, Pennsylvania, Civil Division, letters rogatory for the documents had been issued, but the Supreme Court of Ontario refused to enforce the letters. In a decision of June 29, 1977, that court had held that disclosure would be "harmful to the public interest" of Canada and that

> [I]t is inappropriate . . . to invoke the doctrine of comity of nations in an effort to search out testimony and documents designed to permit a foreign tribunal to determine whether actions taken by or on behalf of the Government of Canada were contrary or inconsistent with the laws of a foreign country . . . . Similarly, in this very special factual situation, letters rogatory should not . . . be enforced against officers of Canadian corporations whose actions during the pertinent period had received the stamp of approval of the Canadian Government.

In re Evidence Act, R.S.O. 1970, c. 151 (and *In re: Westinghouse Electric Corp. Uranium Contracts Litigation*), —— Ont. 2d —— (1977).

In the case of *In re Westinghouse Electric Corp. Uranium Contracts Litigation*, 563 F.2d 992 (10th Cir. 1977), Rio Algom Corp. was unable to produce the desired Canadian documents in response to a discovery request. The federal judge, the Hon. Willis W. Ritter, thereupon issued an order finding Rio Algom in contempt of court, and imposing a fine, notwithstanding the argument that disclosure of the documents was prohibited by Canadian law. On October 11, 1977, the Court of Appeals for the Tenth Circuit reversed, finding that a good faith effort had been made to secure the documents and that the refusal to violate Canadian law could not be penalized in this manner. The court of appeals noted on several occasions that Canada's sovereign interests were heavily involved in this matter. 563 F.2d at 995, 998, 999.

3. Judge Felter's First Canadian Documents Order and GAC's Waiver Request

On the same day that the Tenth Circuit decided the Westinghouse case, October 11, 1977, Judge Felter issued a discovery order directing GAC to identify and produce the GMCL documents "reposing in Canada" and to try to secure a waiver of any Canadian prohibition against identifying, summarizing, copying or producing the documents (App. F, pp. 28a-33a, *infra*).

GAC thereupon tried in good faith to secure a waiver with respect to the documents in GMCL's possession. In a letter of October 13, 1977, it requested a waiver from the Honorable Alastair Gillespie, Minister of the Canadian Department of Energy, Mines and Resources (App. G, pp. 34a-36a, *infra*). The Minister refused the waiver in a letter of October 19, 1977, stating that compliance by GMCL would be a violation of the Regulations, that production of the documents would be "contrary to the interests of Canada" and that mere identification of the documents "would contravene the Uranium Information Security Regulations of Canada" (App. H, pp. 37a-

38a, *infra*). The request for a waiver and the Canadian Government's official reply were transmitted to Judge Felter.

4. Judge Felter's Second Canadian Documents Order

On November 18, 1977, Judge Felter entered an order which declared preliminarily (App. B, pp. 3a-4a, *infra*):

> Deference to the sovereignty and national interest of Canada or its provinces cannot be accomplished through sacrifice of the sovereignty of New Mexico and of due process of law and equal application and protection of law afforded by the laws of New Mexico. In this forum, the aforesaid laws of this forum which protect the fundamental public policy of this state must govern over the national interest or policy of a foreign country as legislated and conceived by that foreign country. No rule of comity would require a sovereign state of the United States to so abdicate the protection of fundamental rights under its general laws that are necessary to a fair trial in favor of special foreign laws that are not concerned with any aspect or requirement of fair trial.

The order then directed GAC to identify and produce documents located in Canada and declared that

> all facts provable from documents housed in Canada which are not produced and which are the subject of said motion are found against defendant, General Atomic Company, and said defendant is precluded from offering evidence herein in opposition to such findings of fact . . . .

This order—which elevates the "public policy" of New Mexico over "the national interest or policy of a foreign country"—thus required production of Canadian documents upon pain of irrebuttable findings which could effectively dispose of the case.

5. GAC's Second Waiver Request

Ten days before the entry of the November 18 order, GAC submitted a second request for a waiver to Minister

Gillespie. In this request, GAC asked for permission for GMCL to provide GAC with only an identification of the Canadian documents (App. I, pp. 39a-40a, *infra*). The Minister denied GAC's request by letter dated December 6, 1977 (App. J, p. 41a, *infra*). The Minister's letter also referred to a recent judicial opinion, written by the Chief Justice of the Ontario Supreme Court, ruling that there was no statutory or regulatory authority to waive the prohibition against disclosure of the documents. On December 9, 1977, Minister Gillespie also wrote a letter to GMCL, warning it that Canadian law would be violated by any disclosure of documents to GAC or by any assistance it might give GAC in identifying or producing the documents (App. K, pp. 42a-43a, *infra*).

6. GAC's Motion to Vacate, and the Canadian Government's Diplomatic Notes

Subsequent to these formal notifications from the Government of Canada, GAC requested Judge Felter to vacate his order of November 18. While GAC's motion to vacate was pending, the United States Department of State delivered to Judge Felter two formal Diplomatic Notes transmitted by the Government of Canada. The covering letter and the text of the Notes appear in Appendix C, pp. 8a-12a, *infra*. The earlier of the two Notes, dated August 15, 1977, stated the basis for Canada's participation in the uranium marketing arrangement, and said that (App. C, p. 9a, *infra*):

> The Canadian Government finds it objectionable that this Canadian Government policy should be questioned under United States law.

The second Note, dated December 9, 1977, explicitly made reference to Judge Felter's order directing GAC to identify and produce documents in the possession of GMCL. The Note called attention to the Canadian pro-

hibition against disclosure and to the recent Canadian judicial decision holding that there was no authority to waive the prohibition. The Note concluded (App. C, pp. 11a-12a, *infra*):

> The Canadian Government is deeply concerned that an order has been issued by the United States Court, the effect of which would be to compel the identification and production of documents in Canada contrary to Canadian law, a result that would be inconsistent with international comity. The Canadian Embassy requests the Department of State to bring the Canadian Government's position, including the views expressed in the Secretary of State of External Affairs Note No. FLP-177 of August 15, to the attention of the United States Court in New Mexico.

7. Denial of the Motion to Vacate

On December 20, 1977, the Diplomatic Notes were sent to Judge Felter by the State Department. On December 27, Judge Felter denied GAC's motion to vacate his order of November 18 (App. L, pp. 44a-46a, *infra*). Despite the Canadian Government's repeated statements that identification of the Canadian documents would violate Canadian law, Judge Felter said that it had not been shown to his "satisfaction" that identification would violate Canadian law, and that, even if identification would violate Canadian law, the order of November 18 must still stand.

8. GAC's Petition for a Writ of Prohibition

On January 5, 1978, GAC filed a petition for an original writ of prohibition in the New Mexico Supreme Court. The petition alleged that Judge Felter had exceeded his jurisdiction by asserting authority to rule on claims concerning the legality of an international arrangement sponsored and enforced by the Canadian Government and by ordering the identification and production of GMCL's Canadian documents in violation of Canadian law and over the official protests of the Government of Canada. The petition requested the New Mexico Supreme Court to restrain Judge Felter from these actions exceeding his jurisdiction. The New Mexico Supreme Court denied the requested writ of prohibition by order dated January 11, 1978 (App. A, p. 1a, *infra*).

Thereafter, GAC filed a motion for a stay of the trial pending the filing and disposition of a petition for a writ of certiorari to be filed with this Court. On February 1, 1978, the New Mexico Supreme Court denied that motion, but provided in its order that Judge Felter should "allow the parties sufficient time prior to the entry of any order of findings of facts based upon the order of November 16, 1977 [*sic*] to present to this Court additional motions as may be appropriate" (App. M, pp. 47a-48a, *infra*).

REASONS FOR GRANTING THE WRIT

1. The Canadian Documents Order Intrudes Upon Foreign Relations, Which Are Within the Exclusive Authority of the Federal Government

This Court held in *Zschernig* v. *Miller*, 389 U.S. 429, 440-441 (1968), that a State statute which might "impair the effective exercise of the nation's foreign policy" or which "may disturb foreign relations" constitutes an unconstitutional intrusion into the exclusive authority of the federal government over the field of foreign affairs—a field which "the Constitution entrusts to the President and the Congress." 389 U.S. at 432. The same considerations apply to the judicial order which is at issue here.

In this case a State court is requiring GAC to obtain identification and production of foreign documents of GMCL, a non-party Canadian corporation, though for

GMCL to do these acts would violate a foreign criminal law. A sovereign foreign government, which is closely allied to the United States, has formally advised the State judge that its criminal law would be broken, and its national policy interfered with, if private parties were to carry out his discovery order. It has also formally expressed its concern over the very entry of an order which, if implemented, would have these consequences. The foreign government has additionally protested and refused to allow compliance with similar discovery orders in prior cases, including the *Duquesne* and *Westinghouse* litigations discussed above, and has explicitly warned GMCL against cooperating with the New Mexico court's discovery order.[7] In this set of circumstances, the State court must excuse a private party's inability to comply with its discovery order—an inability which clearly is beyond the private party's control, and which is a direct consequence of the enforcement of foreign law on foreign territory in a matter of grave importance to a foreign government.

Any other action by the State court invariably "launch[es] the state upon a prohibited voyage into a domain of exclusively federal competence," 389 U.S. at 442 (Stewart and Brennan, JJ., concurring). For it is plain that Judge Felter has issued and is enforcing his discovery order because he is unwilling to accept, and has determined to override, the sovereign national and international policies of a foreign nation. This is clearly true with respect to Canada's policy against disclosure of documents, as well as with its underlying policy of enforcing a marketing arrangement. Indeed, Judge Felter has been explicit in his unwillingness to accept Canada's policy regarding disclosure of documents and in his in-

[7] The actions of the Canadian Government show that this case has nothing in common with cases in which private litigants assert dubious claims that compliance with a court order would cause a violation of foreign law. See, *e.g.*, *Arthur Andersen & Co.* v. *Finesilver*, No. 77-1591, decided February 9, 1978, Tenth Circuit Court of Appeals.

tent to override its policy: His "discovery order" of November 18 recited that the fundamental public policy of New Mexico "must govern over the national interest or policy of a foreign country as legislated and conceived by that foreign country."

Judge Felter's judicial act of ignoring and overriding the criminal law and national policies of an internationally sovereign government—which happens to be one of our closest allies—cannot stand under the decisions of this Court. *Zschernig* v. *Miller*, and the line of cases that preceded it—including *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *United States* v. *Belmont*, 301 U.S. 324 (1937); and *United States* v. *Pink*, 315 U.S. 203 (1942)—have established the rule that "complete power over foreign affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the states." *Belmont*, 301 U.S. at 331. In this connection, this Court observed in *Pink* that the States must abstain in matters affecting foreign relations—"an exclusive federal function"—lest there be "serious consequences" for "[t]he nation as a whole." 315 U.S. at 232. This position was reaffirmed in *Zschernig*. 389 U.S. at 432, 436, 440 and 441.

By determining not to accept Canada's criminal law and policy despite the formal representations of the Canadian Government, Judge Felter is failing to honor this Court's teaching that States must abstain in matters connected with foreign relations. Judge Felter failed even to seek guidance from the Executive Branch on the implications of any decision he might reach,[8] and ap-

[8] The State Department's boilerplate statement in its cover letter of December 20 that "[t]ransmittal of these documents should not be understood as having implications with respect to the foreign affairs of the United States" (App. C, p. 8a, *infra*) was not, of course, an evaluation of the impact of Judge Felter's ruling on foreign relations. A formal inquiry to the Department of State—which would have been the natural reaction of a federal court—was not even made.

parently accorded no weight whatever to the representations of the Canadian Government.[9] Instead, he deliberately took highly controversial action having a "great potential for disruption or embarrassment" in the delicate field of foreign affairs. *Zschernig* v. *Miller*, 398 U.S. at 435. Such action is forbidden to a State trial judge, who must withdraw or abstain from interfering with foreign affairs, no less than a State legislature.

2. Judge Felter Is Violating the Act of State Doctrine

As noted above, Judge Felter has overriden the objections of the Government of Canada and totally discounted a criminal law enacted and enforced on Canadian territory by the Canadian Government. It seems equally clear that Judge Felter's order requiring the production of Canadian documents is merely the first step in a comprehensive adjudication of the legality of the international marketing arrangement sponsored and enforced on Canadian territory by the Canadian Government. If such an adjudication were not his intention, Judge Felter would not be compelling the production of GMCL's Canadian documents relating to the arrangement.

As is true of the discovery order itself, the intended adjudication by Judge Felter has been challenged by the Canadian Government. It has formally objected to the fact that Judge Felter is questioning the international

[9] When this Petition was prepared, Judge Felter had not yet elaborated the precise findings of fact by which he is sanctioning GAC for failing to cause GMCL to violate the criminal law of Canada. See n. 11, *infra*. (Briefs addressed to the precise findings were before him.) The unconstitutionality of his intrusion into foreign affairs, however, does not turn upon his elaboration and formal entry of the findings. Rather, illegality inheres in his very act of issuing a discovery order which overrides Canadian law and policy, and does so over the formally transmitted objections of the Canadian Government. The issuance of such an order, which exceeded Judge Felter's constitutional jurisdiction, required the New Mexico Supreme Court to issue a writ of prohibition.

marketing arrangement which Canada sponsored and enforced in its own country. The Canadian Government's objection was spelled out in the Diplomatic Note of August 15, 1977, which stated Canada's reasons for adopting the marketing arrangement and which was transmitted to Judge Felter by the State Department at the request of the Canadian Government (App. C, pp. 8a-12a, *infra*).

Overriding a criminal law applicable on Canadian soil and questioning the legality of an arrangement enforced on Canadian territory (both done over the formal protests of Canada) amount to a violation of the "act of state" doctrine. Such actions constitute "court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch of our government in the conduct of our foreign relations."[10] *Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682, 697 (1976). It is clear from the record that Judge Felter has determined to "sit in judgment on the acts of the government of another [nation] done on its own territory." *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897). And he is acting despite

> . . . the absence of consensus on the applicable international rules, the unavailability of standards from a treaty or other agreement, . . . the sensitivity of the issues to national concerns, and the power of the Executive alone to effect a fair remedy for all United States citizens who have been harmed . . . .

First National City Bank v. *Banco Nacional de Cuba*, 406 U.S. 759, 788 (1972) (Brennan, J., dissenting).

[10] The "act of state" doctrine reflects the strong sense of the judiciary that matters of international relations are best handled by the Executive Branch of the Federal Government, and the fear that judicial decisions may interfere with the conduct of foreign relations. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964); *Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682 (1976).

3. The New Mexico Supreme Court's Denial Of a Writ of Prohibition Is Immediately Reviewable

Judge Felter has exceeded the jurisdiction of a State court by unlawfully intruding into domains reserved to the federal government, and by overriding and questioning the official acts of a foreign government on its own territory. Because such jurisdictional excesses are inherently harmful to foreign relations, appellate courts should not wait until litigation in the trial court is concluded before taking corrective action. This is particularly true when, as here, the foreign government has directly objected to the trial court's action. Thus, the New Mexico Supreme Court should have issued a writ of prohibition restraining Judge Felter's unlawful assertions of jurisdiction. Its denial of a writ of prohibition on January 11, 1978, is immediately reviewable in this Court under 28 U.S.C. § 1257(3). As this Court said in *Madruga* v. *Superior Court*, 346 U.S. 556, 557 n.1. (1954), "[t]he State Supreme Court's judgment finally disposing of the writ of prohibition is a final judgment reviewable here under 28 U.S.C. § 1257." The ruling in *Madruga* was recently reaffirmed and followed by this Court in *Fisher* v. *District Court*, 424 U.S. 382, 385 (1976), and is applicable here.

Nor is there any basis for deferring prompt review because of the concluding language of the State supreme court's order of February 1, 1978. In denying stays pending the filing and disposition of papers in this Court, the State supreme court ordered Judge Felter "to allow the parties sufficient time prior to the entry of any order of findings of facts based upon the order of November 16 [sic], 1977 . . . to present to this Court additional motions as may be appropriate." Although this language appeared to provide an opportunity for further review by the New Mexico Supreme Court prior to the entry of any judgment by Judge Felter (see App. N, p. 50a *infra*), the New Mexico Supreme Court closed that avenue on March 2, 1978. Judge Felter had issued a notice on February

16 (App. O, pp. 51a-52a *infra*) stating that he would enter his findings on or after March 1, but giving the parties only until February 28 to file motions in the New Mexico Supreme Court pursuant to the Supreme Court's Order of February 1, 1978. GAC thereupon filed a motion with the New Mexico Supreme Court requesting a stay of any entry of findings and a certification by Judge Felter of his proposed findings. The New Mexico Supreme Court heard the motion on March 1 and denied it summarily on March 2 (*see* Attachment IV to the Application for Stay accompanying this petition).[11]

In any event, in its order of February 1, 1978, the New Mexico Supreme Court did not question Judge Felter's ruling on the fundamental jurisdictional question raised in GAC's Petition for Writ of Prohibition, which the State supreme court had already turned down on January 11. That fundamental question, which has nothing whatever to do with the particular facts which Judge Felter may enter as a sanction against GAC, is whether, in the face of formal objections from the Canadian Government, Judge Felter has authority to require GAC to obtain the production of Canadian documents from GMCL although such disclosure by GMCL is a crime in Canada, or authority to adjudicate the legality of the international arrangement sponsored and enforced on its own soil by the Canadian Government.[12]

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[11] The denial of the motion by the New Mexico Supreme Court on March 2 occurred after the preparation of this petition. Also, thirty minutes after the State supreme Court's denial, Judge Felter entered a Sanctions Order and Default Judgment described in the Application for Stay accompanying this petition. As stated in the accompanying application for stay, the Sanctions Order and Default Judgment will be the subject of another petition for certiorari to be filed within fourteen days.

[12] Moreover, additional support for immediate review of Judge Felter's order is provided by the fact that his order may cause GAC to suffer collateral harm amounting to many millions of dollars in other pending judicial proceedings, a pending arbitration, and in future suits which may be brought because of Judge Felter's order. Such collateral harm could arise because other tribunals possibly

4. Judge Felter's Canadian Documents Order Deprives GAC of Due Process of Law

In his order of November 18, Judge Felter accomplished two things: He required GAC to obtain Canadian documents from GMCL for production in his court, and he imposed a drastic sanction for nonproduction. The sanction is that all facts allegedly provable from the documents "are found" against GAC, which "is precluded from offering evidence herein in opposition to such findings of fact." This sanction is being applied despite two good faith efforts by GAC to secure a waiver from the Canadian Government. Pursuant to this order, Judge Felter presently has under advisement extensive briefs addressing the precise findings of fact which he will enter. Under the order of November 18, the findings of fact will be adverse to GAC. In fact, as a practical matter, they may well dispose of the litigation adversely to GAC.

It is clear that Judge Felter's order of November 18 violates the Due Process Clause as interpreted by this Court in *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958), and is in conflict with the ruling of the Tenth Circuit in the Westinghouse litigation discussed above. *In re Westinghouse Electric Corp. Uranium Contracts Litigation*, 563 F.2d 992 (10th Cir. 1977). In *Societe*, a plaintiff made good faith efforts to produce certain documents, but ultimately was unable to produce them because production would have been a crime under Swiss law. The district court thereupon ordered that plaintiff's complaint be dismissed. This Court reversed the sanction, ruling that in light of the Due Process Clause, the sanction could not be imposed upon a party who had made

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could follow Judge Felter's ruling of November 18, and the *res judicata* effect of such a ruling—even if reversed on appeal—is uncertain. *See Reed* v. *Allen*, 286 U.S. 191 (1932); *Huron Holding Corp.* v. *Lincoln Mine Operation Co.*, 312 U.S. 183 (1941); 1B *Moore's Federal Practice* ¶ 0.416[4] (1974). For these reasons, too, it is important that Judge Felter's jurisdictional excesses not go unreviewed until the conclusion of the trial in this Court.

efforts to satisfy a discovery order but was unable to do so because of the conduct of others or circumstances beyond its control. This Court said that "substantial constitutional questions are provoked" under the Due Process Clause by an order "striking . . . a complaint because of a plaintiff's inability, despite good faith efforts, to comply with a pretrial production order." 357 U.S. at 210. The Court further stated that "fear of a criminal prosecution constitutes a weighty excuse for nonproduction" and that dismissal should not be ordered where nonproduction is "due to inability, and not to willfulness, bad faith, or any fault" of the nonproducing party. 357 U.S. at 212.

As was true of the sanctioned party in *Societe*, GAC has made good faith efforts to comply with discovery orders of the trial court. And, as in *Societe*, GAC's inability to produce is due to reasons wholly outside its control—Canada has made disclosure or identification of the documents by GMCL a crime, and the Canadian Government will not waive the criminal regulations. (Indeed, there appears to be no authority under Canadian law to waive the regulations.)

The *Westinghouse* case, which was specifically called to Judge Felter's attention, was not even mentioned by him in his order of November 18. It, too, concerned an order for Canadian documents, in circumstances which were substantially identical to the present case. *Westinghouse* involved the same international marketing arrangement, the same kinds of documents, and the same Canadian laws and regulations as this case. Furthermore, just as Rio Algom Corporation had unsuccessfully tried to obtain a waiver from the Canadian Government, so here GAC has tried to obtain a waiver.

Because Rio Algom Corporation was unable to produce the Canadian documents, Judge Willis Ritter imposed a fine on it for contempt of court. The court of appeals

reversed, relying on the fact that Rio Algom had sought a waiver from the Canadian authorities (563 F.2d at 998-1000), pointing out that the sovereign interests of Canada were heavily involved in the matter (563 F.2d at 995, 988, 999), and concluding that the district court had erred in failing to give consideration to Canada's interests (563 F.2d at 999). The conflict with Judge Felter's ruling, which gives no heed to GAC's two requests for waiver and ignores Canada's interests, could not be more striking.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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JOHN BODNER, JR.
NATHAN LEWIN
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Of Counsel

Dated: March 3, 1978

APPENDICES

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APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

Wednesday, January 11, 1978

No. 11,777

STATE OF NEW MEXICO, EX REL.
GENERAL ATOMIC COMPANY,
Petitioner,

vs.

HON. EDWIN L. FELTER, District Judge,
First Judicial District, State of New Mexico,
Respondent.

ORIGINAL MANDAMUS AND PROHIBITION
PROCEEDING UNDER POWER OF
SUPERINTENDING CONTROL

This matter coming on for consideration by the Court upon petition for writ of mandamus and prohibition under power of superintending control, and the Court having considered said petition and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that petition for writ of mandamus and prohibition under power of superintending control be and the same is hereby denied.

ATTEST: A TRUE COPY

/s/ [Illegible]
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX B

IN THE DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

No. 50827

UNITED NUCLEAR CORPORATION,
Plaintiff,
vs.
GENERAL ATOMIC COMPANY, ET AL.,
Defendants.

ORDER

This matter coming on regularly to be heard by the Court upon the motion of Plaintiff, United Nuclear Corporation "For Order Compelling Identification and Production of Documents and Finding All Facts Provable From Canadian Documents Against Gulf and GAC", and the responses to said motion filed by Defendant, General Atomic Company; the Court having considered said motion, responses, oral and written arguments of counsel, affidavits, the record proper and evidence heretofore admitted by the Court applicable to such motion, and being otherwise fully advised in the premises, Finds and Concludes:

1. Due process of law and the equal application and protection of law require that *each* party to this case fully comply with Rules 31 through 34 inclusive of the New Mexico Rules of Civil Procedure and produce for inspection and copying *all* documents included within the scope of such rules which are relevant or may lead to relevant evidence and which are not privileged under the laws of New Mexico.

2. Deference to the sovereignty and national interest of Canada or its provinces cannot be accomplished through sacrifice of the sovereignty of New Mexico and of due process of law and equal application and protection of law afforded by the laws of New Mexico. In this forum, the aforesaid laws of this forum which protect the fundamental public policy of this State must govern over the national interest or policy of a foreign country as legislated and conceived by that foreign country. No rule of comity would require a sovereign state of the United States to so abdicate the protection of fundamental rights under its general laws that are necessary to a fair trial in favor of special foreign laws that are not concerned with any aspect or requirement of fair trial.

3. No adequate remedy or protection in these premises exists except for the production of the documents which are the subject of the foregoing motion or the finding by this Court of all facts provable from such documents against the party failing to produce them in accordance with Rules 31 through 34, inclusive, and as authorized by Rule 37 of the New Mexico Rules of Civil Procedure. Said documents have not been produced for inspection and copying, and Defendant, General Atomic Company has failed to produce said documents, caused in part, by its own early and deliberate policy of housing such documents in Canada and outside the boundaries of the United States of America.

4. The Court's order herein dated October 11, 1977 required of Defendant, General Atomic Company that it "clearly and definitively" identify all documents housed in Canada, but said order did not specify a "summary of its contents" as a part of such identification. These provisions of the Court's order were not performed or complied with but rather they were sought to be avoided.

5. In response to the Court's order of October 11, 1977 Defendant, General Atomic Company identified certain

documents not housed in Canada by reference to computer number. Such method of identifying documents in this instance and in view of the time constraints imposed therein, may be considered by the Court to be a reasonable and substantial compliance with the Court's order as to those documents so identified, to the extent that such identification is accurate.

Now, Therefore, In Accordance With The Foregoing Findings and Conclusions, IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. Defendant, General Atomic Company, forthwith shall identify, clearly and definitively, all documents housed in Canada which are the subject of said motion.

2. All facts provable from documents housed in Canada which are not produced and which are the subject of said motion are found against Defendant, General Atomic Company, and said defendant is precluded from offering evidence herein in opposition to such findings of fact; subject however, to the other provisions of this order.

3. On or before December 15, 1977, or at least 7 days before plaintiff rests its case in chief, whichever shall first occur, Plaintiff, United Nuclear Corporation shall file and serve proposed findings of fact on the factual issues to be determined against Defendant, General Atomic Company by reason of the non-production of the foresaid "cartel" documents which are the subject of Plaintiff's motion. Within fifteen (15) days after service of such proposed findings of fact, each defendant herein may file and serve responses to such proposed findings of fact. All parties may accompany such filings with memoranda of argument and authorities, if desired.

4. In making its final decision herein and at any other appropriate stage of the proceedings herein the Court will consider and give effect to appropriate findings of fact consistent with this order and consonant with the

evidence then admitted and before the Court, which is relevant to the issue.

5. The time limits specified in this order may be extended, shortened or modified for good cause shown.

/s/ Edwin L. Felter
EDWIN L. FELTER
District Judge

APPENDIX C

NOTE NO. FLP-178

The Department of External Affairs has the honour to refer to the Acting Secretary of State for External Affairs' Note No. FLP-177 of August 15 concerning investigations, hearings and actions concerned with international uranium marketing arrangements that are currently being undertaken by the executive, legislative and judicial branches of the United States Government and State Governments.

The Government of Canada understands that the Federal District Court in the Third Judicial District in Salt Lake City, Utah, has ordered Rio Algom Corporation, a U.S.A. subsidiary of a Canadian company, to produce documents which the Government understands were at one time in the possession of the Canadian parent but were never in the territory of the U.S.A. and are now at the request of the Government of Canada in the Government's possession. The Government further understands that the court has taken steps to penalize Rio Algom Corporation by imposing a fine of $10,000 a day for failure to comply with its order, notwithstanding the fact that in the absence of consent by the Canadian Ministry of Energy, Mines and Resources, the documents are prohibited by Canadian regulations from removal from Canada. The Minister has written to the Canadian company denying its request that the documents be released.

The Canadian Government is deeply concerned that an order has been issued by a U.S.A. court, the effect of which would be to compel the production of documents from Canada contrary to Canadian law, a result that would be inconsistent with international comity. The Department of External Affairs requests the Department of State to bring the Canadian Government position to the attention of the U.S.A. court where this order is now under appeal.

The Department of External Affairs avails itself of this opportunity to renew to the Embassy of the United States of America the assurances of its highest consideration.

Ottawa
August 15, 1977

DEPARTMENT OF STATE
Washington, D.C.

[SEAL]

December 20, 1977

The Honorable Edwin L. Felter
P.O. Box 2268
Santa Fe, New Mexico 87501

Re: United Nuclear Corporation v. General Atomic Company, *et al.*, Santa Fe Docket No. 50827

Dear Judge Felter:

The Government of Canada, through the Canadian Embassy in Washington, D.C., has requested the Department of State to convey to the Court the views of the Government of Canada with respect to certain issues relating to the above-captioned litigation. Copies of the text of two diplomatic notes containing these views are attached.

The Department of State, in transmitting the views of the Canadian Government, takes no position with regard to any of the issues raised in either of the two notes. Transmittal of these documents should not be understood as having implications with respect to the foreign affairs of the United States.

Sincerely,

/s/ John R. Crook
JOHN R. CROOK
Assistant Legal Advisor
for European Affairs

Enclosures: As stated

Ottawa, August 15, 1977

NO. FLP-177

His Excellency
Thomas Ostrom Enders,
Ambassador of the United
States of America,
OTTAWA.

Excellency,

I have the honour to refer to investigations, hearings and actions concerned with international uranium marketing arrangements that are currently being undertaken by the executive, judicial and legislative branches of the United States Government and State Governments and in particular to investigations being conducted by a Department of Justice Grand Jury, the House of Representatives Sub-Committee on Oversight and Investigations and cases related to this matter being heard in courts in the United States including that in the U.S. District Court for the Western District of Pennsylvania in Pittsburg and that under appeal from the Federal District Court in the Third Judicial District in Salt Lake City.

I have the honour to inform you that the policy of the Canadian Government was to support and participate in international uranium marketing arrangements from 1972 to 1975 to ensure the survival of the Canadian uranium industry which was being damaged by the restrictive uranium trade practices of the United States. Canadian Ministers and officials were acting within their authority in this matter and acted in the way they did to protect Canadian national interests. The Canadian Government finds it objectionable that this Canadian Government policy should be questioned under United States law.

I have the further honour to inform you that the participation of all Canadian uranium producers in these uranium marketing arrangements was a matter of Canadian Government policy to ensure the survival of the industry and, accordingly, to protect the Canadian national interest. Canadian Government policy in this regard was implemented through the Atomic Energy Control Act and Regulations. These Regulations provide, *inter alia*, that no person shall produce, mine, prospect for, refine, use, sell, export, import or possess for any purpose natural uranium, except in accordance with a license issued by the Atomic Energy Control Board.

I have the honour to request that you communicate this information at your earliest convenience to the United States Government and in particular to the bodies referred to above which are currently considering matters related to the uranium marketing arrangements.

Accept, Excellency, the renewed assurances of my highest consideration.

/s/ B. Cullen
B. CULLEN

Acting Secretary of State
for External Affairs

Canadian Embassy [SEAL] Ambassade du Canada

No. 620

The Canadian Embassy presents its compliments to the Department of State and has the honour to refer to the Secretary of State for External Affairs Note No. PLP-177 of August 15 regarding investigations, hearings and actions concerned with international uranium marketing arrangements that are currently being undertaken by the executive, legislative and judicial branches of the United States Government and State Governments.

The Government of Canada understands that the District Court for the County of Santa Fe, New Mexico, has ordered General Atomic Company to identify and produce documents which are in the possession of Gulf Minerals Canada Limited, a related Canadian Company, in Canada. The Government further understands that the Court has taken steps to penalize General Atomic and that General Atomic will be precluded from offering evidence in opposition to such findings of fact, subject to other provisions of the order. The Court issued this order notwithstanding the fact that Canadian regulations prohibit identification or production of these documents except where such release or disclosure is required by or under a law of Canada, and the fact that the Canadian Minister of Energy, Mines and Resources has written to the counsel for General Atomic Company refusing a request to remove and identify the documents. The Supreme Court of Ontario has recently decided that the Minister of Energy, Mines and Resources cannot, in any event, exempt persons from the Canadian regulations.

The Canadian Government is deeply concerned that an order has been issued by a United States court, the affect of which would be to compel the identification and production of documents in Canada contrary to Canadian

law, a result that would be inconsistent with international comity. The Canadian Embassy requests the Department of State to bring the Canadian Government's position, including the views expressed in the Secretary of State for External Affairs Note No. PLP-177 of August 15, to the attention of the United States court in New Mexico.

The Canadian Embassy avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, December 9, 1977 [SEAL]

APPENDIX D

Energy, Mines and Resources Canada | Energie, Mines et Ressources Canada

INFORMATION EMR-OTTAWA K1A 0E4
NEWS RELEASE

14 October, 1977

PRESS RELEASE BY THE HONOURABLE ALASTAIR GILLESPIE

The Honourable A. W. Gillespie today said:

"Over the past several weeks, the government has been criticized for actions that it took from 1972-75 to protect the Canadian uranium industry from the consequences of U.S. actions. I want to respond to these criticisms today in order to set the record straight.

The government has indicated on a number of occasions that it viewed the establishment of an international marketing arrangement for uranium in 1972 to be in the national interest. It, therefore, authorized its crown corporations to participate in the arrangement and passed a regulation under the Atomic Energy Control Act requiring the Canadian uranium producers to comply with the pricing and quota provisions which had been agreed upon internationally. The government approved this arrangement in 1972, on the specific understanding that it would not apply to the markets of Canada, Australia, South Africa, France and the United States. It was necessary as a matter of public policy for the government to protect our producing industry from extinction and to do so by helping to stabilize world prices at levels above the cost of production. This policy was defensible in 1972 and it is no less defensible today. We were influenced in this decision by the following considerations:

1) The decision was a direct response to U.S. actions that effectively closed the U.S. market for uranium to Canadian producers. I have outlined the conditions of the uranium market and the nature of the U.S. actions in my statement of June 14, 1977 and in a paper of September 22, 1976. These are attached for reference. The Canadian industry had expanded vigorously through the 1950's, essentially to meet U.S. demands. New mining communities were formed and the American actions threatened the existence of these communities, the jobs of many Canadians, and the existence of the industry itself. The Canadian government protested to the government of the United States on a number of occasions, in order to make that government aware of the impact of its action on Canada and to indicate Canada's view that the U.S. action contravened its international responsibilities under the General Agreement on Tariffs and Trade.

   I am today releasing a number of diplomatic communications between our two governments that indicate the steps taken by Canada to make the U.S. aware of our views on this issue.

2) Through 1970 and 1971 the Canadian government took the lead in organizing discussions with governments of countries that bought uranium from us, apart from the United States, in order to seek ways of ensuring the survival of the Canadian uranium industry. These discussions were not successful.

3) The government has always controlled the export of uranium, under the Atomic Energy Control Act, and continues to do so. After the 1972 policy—requiring minimum prices and specifying volumes of sales to export markets—was agreed, the Minister of Energy, Mines and Resources made a public announcement that he was issuing a Direction to the

Atomic Energy Control Board in this regard. The government of the United States and other governments were also informed, in early 1972, that Canadian companies had met with other producers to discuss such matters as minimum prices and the allocation of markets. The notion that Canadian participation in the marketing arrangements was undertaken in secret is, quite simply, untrue.

I am releasing today, the seven general Directions dealing with prices and quotas that were issued between 1972 and 1975 by the Minister to the AECB. In considering these Directions, the following points are particularly relevant:

1) All the Directions make it explicit that the Canadian and U.S. markets were to be excluded from the agreed marketing arrangements. However, the government continued through this period, as it does now, to regulate and review the export of uranium to all countries to ensure that the terms and conditions of such exports were and are in the public interest.

2) The initial Direction of August 17, 1972 set a minimum price of $5.40 per lb. for uranium delivered in that year. At this time the price on international markets (excluding the U.S.) was estimated to be about $5.00-$5.50 per lb. The price in the U.S. market, which amounted to about 70% of the world market at the time, was about $6.00 per lb.

3) The last general price Direction, issued in March of 1974, established a minimum price of $8.20 per lb. for delivery in 1974, rising to $12.20 per lb. for delivery in 1978 (or, alternatively, $9.70 per lb. escalated from 1974 for deliveries to 1985). Early in 1974 it was becoming apparent that the uranium market was beginning to turn around and the Minister's Direction made reference to this trend.

4) By late 1974 it was clear that demand was exceeding supply and the Minister directed the AECB in January of 1975 to disregard the quota restrictions and to bear in mind that the pricing Directions were to be regarded as minimum conditions. In March of 1975, the Minister formally revoked his general pricing Directions to the Board.

5) With the exception of two months in early 1974 prices reported in the U.S. market were never less than the minimum agreed prices. Two charts are attached which indicate the relationship between the U.S. price and the minimum price from 1972-74, and the international selling price of uranium in relation to the last agreed price Direction from 1974 to 1977. It should be noted that the termination in March 1975 of the marketing arrangement—which was said to be artificially increasing the price—did nothing to slow the increase in uranium prices.

In short, the marketing arrangement authorized by the government was temporary. It was defensive in nature and directed at protecting the Canadian industry and Canadian communities against restrictive actions by the U.S.

It is against this background that I wish to deal with the questions of the legality of the arrangement and the Uranium Information Security Regulations.

The legality of the arrangement with regard to the Combines Investigation Act was a matter of concern to the government in 1972.

The government was advised that if the arrangement operated so as to limit the volume of exports from Canada or unduly lessen competition in the Canadian market, it could possibly violate the Combines Investigation Act.

Because it was the government's opinion that the arrangement was in the national interest, it passed a

Regulation in July 1972 under S.9 of the Atomic Energy Control Act authorizing the AECB, in considering export contracts for uranium, to ensure that prices and quantities as specified in Direction to the Board by the Minister of Energy, Mines and Resources, pursuant to S.7 of that Act, were followed. The effect of this was to provide an exemption from the Combines Investigation Act since the Board was effectively regulating the volume of exports pursuant to an Act of Parliament. The jurisprudence under that Act holds that, insofar as the activities of an industry are effectively regulated they cannot be in violation of the Combines Investigation Act. The Regulation did not operate so as to exempt the producers from any activity which might unduly lessen competition in the domestic market.

It was the government's policy that the domestic market be excluded from the international marketing arrangement. The government has no reason to believe that this arrangement violated the Combines Investigation Act. However, recent allegations that this arrangement did violate the Act have made it clear that the public interest requires this issue to be definitively resolved. It is for this reason, that my colleague, the Minister of Consumer and Corporate Affairs, has directed the Director of Investigation and Research to conduct a formal inquiry under the Combines Investigation Act.

The *Uranium Information Security Regulations* are a separate issue. In essence, they were designed to protect the sovereignty of Canada in the face of extraterritorial application of U.S. legal processes.

In 1975, Westinghouse Electric Corporation announced that it could not honour contractual commitments to provide uranium it had sold at fixed prices. During the period when the U.S. market was closed to foreign producers, Westinghouse not only continued to sell in that market but competed actively in other foreign markets,

selling significant amounts of uranium for future delivery at relatively low prices. In short, it sold uranium it did not have and when prices rose rapidly in 1975 Westinghouse stood to incur losses estimated at over $2 billion if it fulfilled its contractual obligations.

Westinghouse is now being sued by its customers and, in turn, is suing many producing companies including some that participated in the marketing arrangements, alleging that they breached United States anti-trust laws.

A Grand Jury was convened by the U.S. Justice Department to examine whether the international marketing arrangement contravened U.S. anti-trust law and, as a result, parents or subsidiaries of Canadian companies were served with subpoenas demanding that documents in Canada be produced before U.S. courts.

The government finds it objectionable that the actions of Canadian uranium producers, which were required by Canadian law and taken pursuant to Canadian policy, should be called into question by foreign courts.

The Regulations were passed because it became obvious, late in 1976, that the government would have to act to prevent documentation on the marketing arrangements from being released to U.S. courts. Failure to take such action would have placed the government in the untenable position of allowing evidence to be provided to a foreign court for use in the possible prosecution of Canadian nationals for acts that were in accordance with Canadian law and government policy.

The Regulations were drafted on an urgent basis, in response to imminent legal acts by U.S. courts. They have been criticized for unduly restricting the rights and privileges of many Canadians who were not involved in the marketing arrangements and for prohibiting full and frank discussion of the events of that time. The Prime Minister indicated in the House of Commons in early August that the Regulations would be reviewed.

In the action brought by 6 Opposition MPs in Toronto, the government's position was that the privilege of freedom of speech in Parliament was paramount and that the Regulation did not interfere with that privilege. It further was the government's position that the Regulation did not prevent a member of the public from consulting a solicitor if the true purpose of the consultation was to be advised as to his own legal rights and obligations. The government also informed the Court at that time that it was considering possible amendments to the Regulations.

The Regulations have been reviewed and, as a result, they are being amended, effective today, to substantially narrow their scope. Their application will be limited to information relating to the export from Canada or marketing for use outside Canada of uranium or its derivatives and to persons associated with uranium producers and the federal government. They will not preclude discussion by others of documents that are now in the public domain.

These limited restrictions continue to be necessary to ensure that Canadian sovereignty is adequately protected from the extraterritorial application of U.S. legal processes. Other countries, such as Australia, have enacted legislation designed to deal with threats of interference with their sovereignty by foreign legal processes and the Canadian government may at some point have to consider introducing such legislation. The government's preference, however, in situations where principles of extraterritoriality and sovereignty conflict, is to seek a negotiated solution through diplomatic means. Discussions directed at such a solution are taking place with the United States government and we are optimistic that an accommodation of interests can be found."

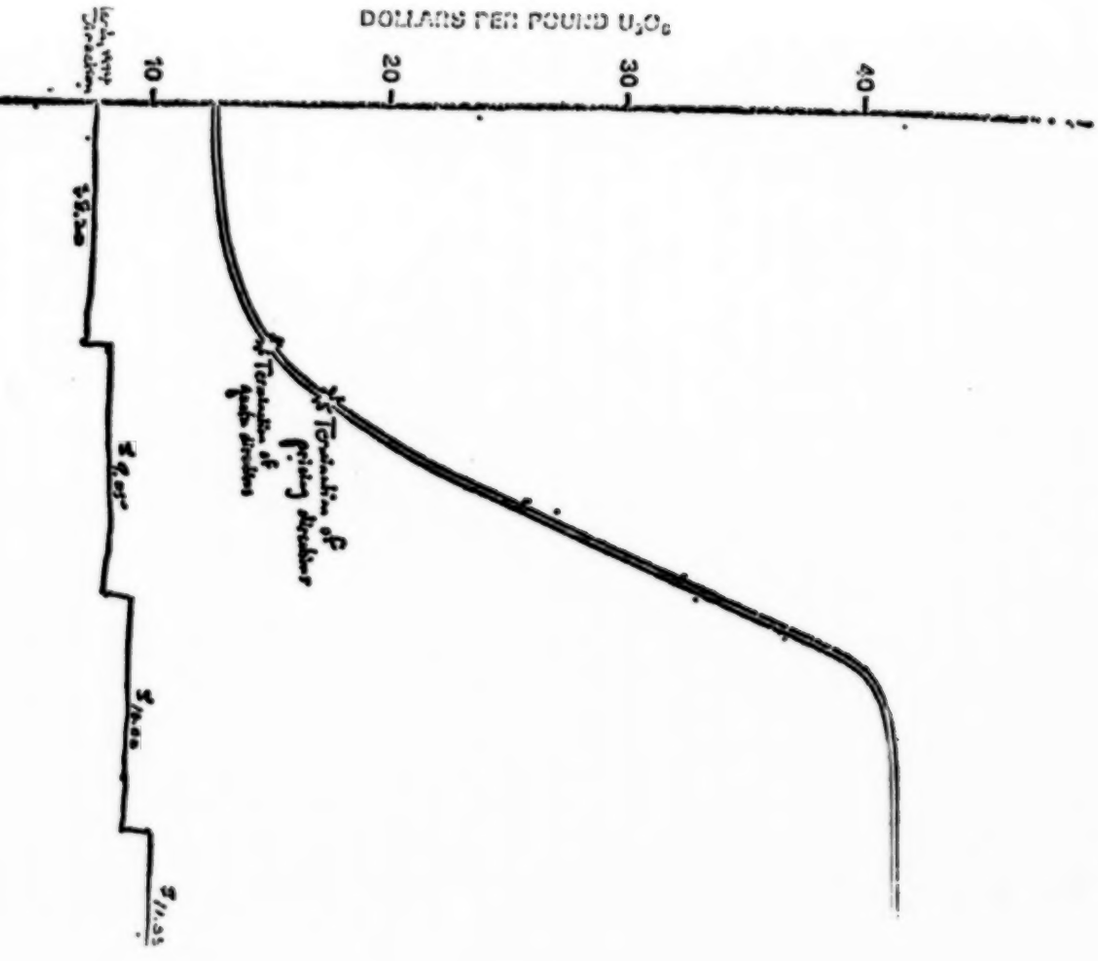

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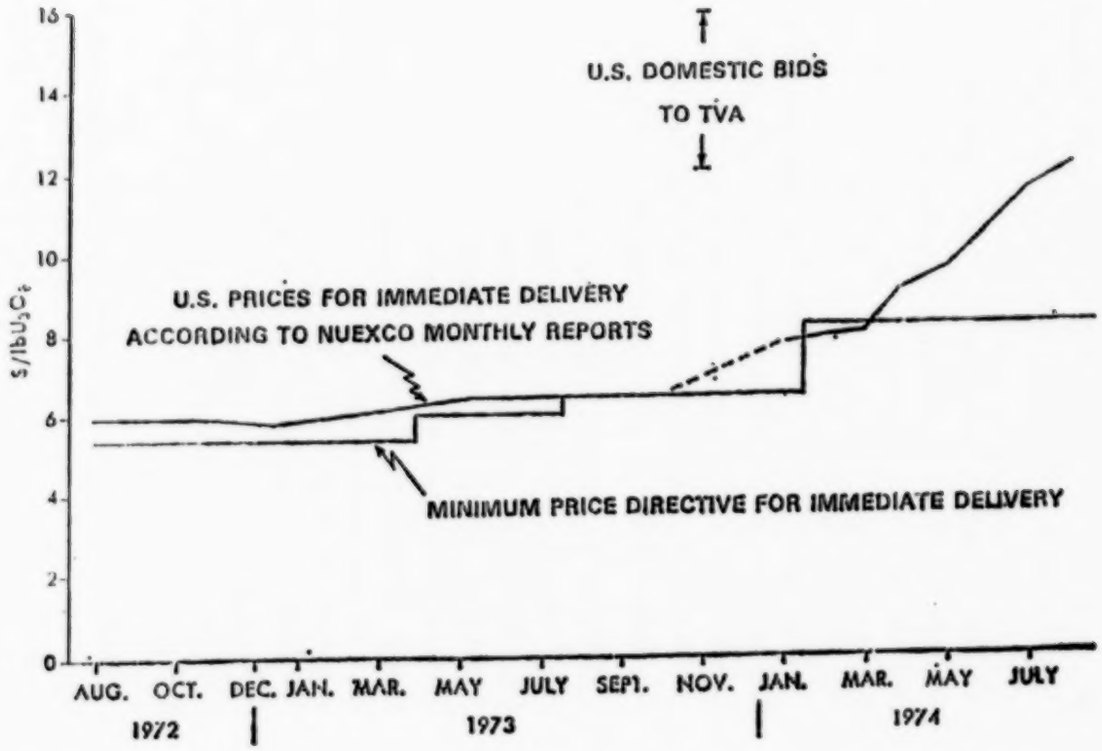
Fig. 2

COMPARISON OF PRICES WITHIN U.S. WITH MINIMUM PRICE DIRECTIVES TO AECB



21a

STATEMENT BY ALASTAIR GILLESPIE MINISTER OF ENERGY, MINES AND RESOURCES

The federal government has approved a regulation under the Atomic Energy Control Act to prevent the removal from Canada of information relating to uranium marketing activities during the period 1972-1975.

The action was taken in the light of the sweeping demand for such information by U.S. subpoenas, which, while served upon officers of United States companies, call for the presentation of information in the possession of subsidiary or affiliate companies "wherever located".

During the early 1970's the Canadian government tried to elicit consuming nation support for the uranium industry and its dependent mining communities which were suffering from an oversupply and low price situation. The problems were compounded by United States policies which closed the large U.S. market to foreign uranium, and at the same time moved uranium from the U.S. government stockpile into the international market through conditions imposed on foreign users of U.S. uranium enrichment facilities. Concurrently, U.S. corporations were competing aggressively for sales outside of their protected domestic market.

Lacking support from consuming nations, and convinced that a viable nucleus of the producing industry was essential in the light of all projections of future demand, the Canadian government initiated discussions with producing nations which led ultimately to an informal marketing arrangement among non-U.S. producers.

Canadian producers acted with the approval and, in some cases, at the specific request of the federal government. The arrangement excluded the U.S. market. The government supported the initiative by directing the Atomic Energy Control Board to reject any export of

uranium at prices below those called for by the marketing arrangements. The minimum prices adopted were almost without exception below those reported within the protected U.S. market at that time and ranged from $5.40 to $8.20 per pound U_3O_8 for immediate delivery in 1972 and 1974 respectively.

The dramatic demand for uranium following the oil crisis of late 1973 propelled prices well above any agreed minimum price structure. Demand suddenly exceeded supply. Because the marketing arrangement had been overtaken by market forces, the Canadian government withdrew all minimum price directives in early 1975.

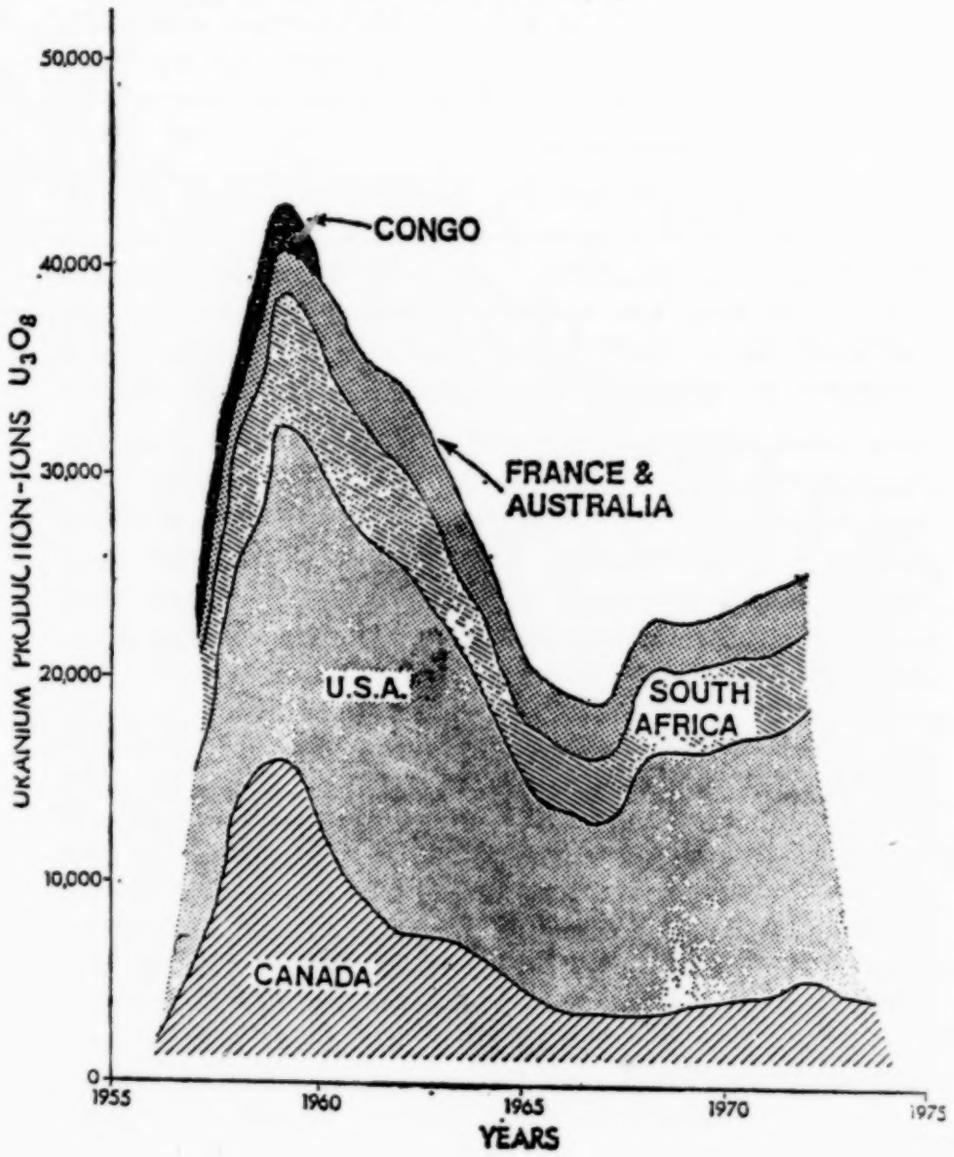
Given this background, it is not surprising that the Canadian material called for by the U.S. subpoenas contains information in respect of activities approved and supported by the Canadian government. Clearly this must be regarded as an issue of sovereignty. The government has therefore moved to prevent the removal of such documents from Canada.

The Canadian government's policy on marketing has always supported an effective consumer-producer dialogue. Although government to government initiatives have so far failed to develop such a mechanism for this essential commodity, it is hoped that the efforts of the producers to achieve a better consumer/producer understanding through the Uranium Institute of London will prove successful.

22 September, 1976

Figure 1

HISTORICAL PRODUCTION OF U_3O_8



STATEMENT BY THE MINISTER OF ENERGY, MINES AND RESOURCES

August 23, 1972

The Honourable Donald S. Macdonald, Minister of Energy, Mines and Resources, issued today the following statement regarding the Government's policy with respect to future sales of uranium to other countries:

"On June 19, 1969, the Government announced a uranium policy providing for the examination of all contracts covering the export of uranium and thorium to ensure that the terms and conditions of such contracts would be in the national interest. The examination is carried out by the Atomic Energy Control Board in consultation with the Department of Industry, Trade and Commerce. Approval of such contracts and issuance of the necessary export permits only take place when all aspects and implications have been found to be in the national interest. A copy of the June 19, 1969, policy statement is attached.

In order to stabilize the current uranium marketing situation and to promote the development of the Canadian uranium industry, I have today issued a Direction to the Atomic Energy Control Board covering such aspects as minimum selling prices and volumes of sales to export markets. Because of the nature of uranium export contracts it would not be in the public interest to disclose further contract details at this time."

APPENDIX E

Registration
SOR/76-644 23 September, 1976

ATOMIC ENERGY CONTROL ACT

Uranium Information Security Regulations

P.C. 1976-2368 21 September, 1976

His Excellency the Governor General in Council, on the recommendation of the Minister of Energy, Mines and Resources, pursuant to section 9 of the Atomic Energy Control Act, is pleased hereby to approve the annexed Regulations respecting the security of uranium information made by the Atomic Energy Control Board.

REGULATIONS RESPECTING THE SECURITY OF URANIUM INFORMATION

Short Title

1. These Regulations may be cited as the *Uranium Information Security Regulations.*

Security of Information

2. No person who has in his possession or under his control any note, document or other written or printed material in any way related to conversations, discussions or meetings that took place between January 1, 1972 and December 31, 1975 involving that person or any other person or any government, crown corporation, agency or other organization in respect of the production, import, export, transportation, refining, possession, ownership, use or sale of uranium or its derivatives or compounds, shall

(*a*) release any such note, document or material, or disclose or communicate the contents thereof to any person, government, crown corporation, agency or other organization unless

(i) he is required to do so by or under a law of Canada, or

(ii) he does so with the consent of the Minister of Energy, Mines and Resources; or

(*b*) fail to guard against or take reasonable care to prevent the unauthorized release of any such note, document or material or the disclosure or communication of the contents thereof.

APPENDIX F

IN THE DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

No. 50827

UNITED NUCLEAR CORPORATION,
Plaintiff,

vs.

GENERAL ATOMIC COMPANY, ET AL,
Defendants.

ORDER

This matter coming on to be heard by the Court upon the motion filed by the plaintiff, United Nuclear Corporation, and joined in by the defendant, Indiana and Michigan Electric Company, for sanctions and to compel answers to plaintiff's second set of interrogatories and for the production of documents; the Court having read the motion, response thereto, attachments and exhibits, supporting memoranda of the parties, having heard arguments of counsel and being otherwise advised in the premises makes the following findings concerning answer to interrogatories and production of documents, which are the subject matter of plaintiff's aforesaid motion, joined in by the defendant, Indiana and Michigan Electric Company, to-wit:

1. *Answer to Interrogatory No. 2*—The answer to this interrogatory, to the greater extent, evades the question rather than answering it. The question, in addition to calling for a direct answer setting forth definite and certain detailed factual information, also calls for a binding committment of the party deposed to the same factual information, quantitatively and qualitatively. The interrogatory calls for a separate and full answer in writing and under oath, which office cannot be filled by oblique references to depositions or other documents, the information from which may be subject to wide differences of opinion and interpretation. Such referenced information from other documents, in more instances than not is vague, indefinite, uncertain, incomplete, elusive and non-responsive and fails to commit to any position, posture or specific factual position.

It matters not that the deposing party may have the information called for by the interrogatory in its possession or that such information may be equally accessible to such deposing party. The deposing party, in addition to the discovery afforded by written interrogatories, is entitled to obtain from the deponent party, a firm committment to a set of facts, posture or position on the subject matter of the interrogatory. Defendant, General Atomic Company, has not answered Interrogatory No. 2 in the manner required by Rule 33 of the Rules of Civil Procedure as that rule has been given meaning and effect.

2. *Answers to Interrogatories Nos. 4, 9, 11, 12, 13, 15, 16, 17, 18, 19, 27, 5, 46, 57, 71 and 75*—answer to each of these interrogatories is defective, incomplete, inadequate and unacceptable for all or most of the reasons stated with reference to the answer to Interrogatory No. 2, supra.

3. *Answers to Interrogatories Nos. 30, 32 and, in part No. 5*—These Interrogatories call for certain and direct identification of documents or portions thereof, and the

answers thereto appear to be incomplete and indefinite as found in succeeding paragraphs of this order.

4. Most of each and all of the entire second set of interrogatories propounded by plaintiff call for specific identification of documents which are tied to the answer to the portions of the interrogatory. This portion of each of such interrogatories either has been ignored in the answer or answered in an incomplete or unsatisfactory manner. Where the interrogatory calls for identification of documents such identification should be made "separately and fully in writing under oath" as contemplated by Rule 33, and not by way of oblique reference to other documents or by deposition bibilography.

5. Defendant, General Atomic Company, may not have produced for inspection and copying, some of the ninety-one documents which Judge Snyder, in Cause No. 6728, on August 10, 1977 on the docket of the U.S. District Court for the Western District of Pennsylvania, and this Court in the case at bar, both have ruled are not subject to a valid claim of attorney-client privilege. Such production for inspection and copying should be accomplished forthwith. Moreover, in this and any other instance where a document ruled by this Court to be subject to claim of attorney-client privilege, has become a public record; then, as to such document, the attorney-client privilege is lost. Any documents, which by action of Judge Snyder in said Cause No. 6728 have now become public documents, are not now subject to this Court's finding that they or any of them are privileged.

This Court's finding of privilege was made without knowlede of the rulings of Judge Snyder upon the status of such documents as privileged, and upon the hypothesis that none thereof was public information. A document loses its attorney-client privilege when it becomes public information, with or without a waiver thereof by the

client. No lawful or valid purpose can be served by "closing the barn door after the horse is already out of the barn."

Irrespective of any prior rulings by this Court that any document is attorney-client privileged, if the document is now a public record, that fact per se voids this Court's finding of privilege, and documents in this category should be produced for inspection and copying.

6. To the extent that there has not yet been produced for inspection and copying, "cartel" and related documents which are available both in the United States and Canada, Defendant, GAC, in good faith, without evasion or reservation should produce for inspection and copying, all of such documents not now subject to any valid claim of privilege. This the defendant, GAC, has not done. The Court finds that documents of this category, either are relevant or may lead to relevant information.

7. Defendant, General Atomic Company, has not made a good faith effort to produce for inspection and copying, those "cartel" and related documents, reposing in Canada, and presumably within the possession of a wholly owned subsidiary, or a wholly owned subsidiary of a wholly owned subsidiary, of one of its constituent partners. Defendant, General Atomic Company is bound by law to take affirmative action and to exert all lawful effort reasonable and possible to bring about the production of those documents and without evasion or deception. In every event no justification has been advanced for failure to identify such documents, there being no assertion that such identification would in any manner violate Canadian law. A good faith effort to produce would prohibit the defendant, GAC, from using the Uranium Information Security Regulations of Canada or the Business Records Protection Act of Ontario, Canada as a dispensation from good faith effort to produce. Rather, the deponent acting in good faith, should seek diligently dispensation from

those Canadian laws so that it could lawfully produce documents to which such laws may pertain.

8. *Interrogatory No. 49*—This interrogatory calls for a "yes" or "no" answer, and for additional response only if answered in the affirmative. It was answered "no", and that answer would appear to be a complete and responsive answer.

Now, therefore, in accordance with the Court's findings,

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. Defendant, General Atomic Company, on or before October 20, 1977 shall make new or additional answers to the interrogatories herein referred to and as required by the Court's findings hereby, without evasion, with full, direct, complete and good faith answers which bind the party deponant to specific facts, posture or position with reference to the factual information called for by the interrogatory. Such answers may not be vague, indefinite or by reference to any other document of an undefined or equivocal meaning, stance or interpretation, but must be separate full and complete answers in writing and under oath as contemplated by Rule 33 of the Rules of Civil Procedure. Additionally, the answers to the interrogatories herein specified and to any other of the plaintiff's second set of interrogatories, wherever requested or called for, new or amended answers should separately, clearly and definitively identify all documents, where such identification is requested, whether such documents be housed only in Canada, only in the United States or in both countries or elsewhere.

2. Insofar as it is lawful so to do, defendant, General Atomic Company, should produce for copying and inspection, on or before October 20, 1977 all documents, not now privileged hereinabove mentioned, including but not

limited to "cartel" and related documents, wheresoever situate.

3. To the extent that it might be a violation of Canadian law to produce here for inspection and copying documents housed in Canada and not also in the United States, defendant, General Atomic Company, should make an immediate diligent and good faith effort to obtain a lawful waiver of or dispensation from such Canadian prohibitions and to the extent thereafter lawful at the earliest possible date, actually produce for inspection and copying of such documents.

4. Any failure to abide by the terms of this Order in good faith or any failure by any party to this action to have submitted or to submit to lawful discovery fully and in good faith, when shown to the satisfaction of the Court to exist at a hearing on the issue set by the Court, or at the trial of the case on its merits, may subject the offending party or parties to such sanctions and inferences by law allowed and warranted. Further, where there may be evidence of record in support thereof, any aggrieved party, along with requested findings of fact and conclusions of law made at the conclusion of trial, may also make requested inferences of fact based upon such evidence.

/s/ Edwin L. Felter
EDWIN L. FELTER
District Judge

APPENDIX G

HOWREY & SIMON
Washington, D.C. 20006

October 13, 1977

The Honorable Alastair W. Gillespie
Minister of the Department of
Energy, Mines & Resources
Ottawa, Ontario
K1A OE4

Re: Request For Consent Under The Canadian Uranium Information Security Regulations

Dear Mr. Minister:

General Atomic Company, a partnership consisting of Gulf Oil Corporation and Scallop Nuclear, Inc., is a party defendant in an action pending in the District Court for the County of Santa Fe, State of New Mexico, entitled *United Nuclear Corporation* v. *General Atomic Company, et al.* (No. 50827). The trial of this action is scheduled to commence on October 31, 1977.

In this action, General Atomic Company has been served with interrogatories and requests for production of documents which call for the production, among other things, of documents relating to the foreign uranium marketing arrangement in the possession of Gulf Minerals Canada Limited, Toronto, Ontario, a subsidiary of Gulf Oil Corporation.

In pleadings filed with the Court as well as at a hearing upon plaintiff's motion to compel further answers to interrogatories and production of documents, the Court was advised of the provisions of the Canadian Uranium Information Security Regulations which, as we understand, prohibit the release of documents in the possession of Gulf Minerals Canada Limited in any way related to conversations, discussions or meetings involving the production, use or sale of uranium between January 1, 1972 and December 31, 1975 unless required to do so by or under a law of Canada or with your consent. Thereafter, the Court entered an order (copy of which is enclosed herewith) directing General Atomic Company to make "an immediate, diligent and good faith effort to obtain a lawful waiver of or dispensation from such Canadian prohibitions. . . ." The operative language (which we have underscored) is set forth in paragraph 3 (at page 5) of the Court's order.

In accordance with the Court's directive, we respectfully request on behalf of General Atomic Company, pursuant to Section 2(a)(ii) of the Uranium Information Security Regulations, that you consent to the release of those documents relating to the foreign uranium marketing arrangement in the possession of Gulf Minerals Canada Limited which are responsive to the aforesaid discovery requests and to permit the same to be copied and produced to plaintiff United Nuclear Corporation in the above-captioned litigation.

The Court's order in paragraph 2 thereof also directs General Atomic Company to identify all responsive documents, where such identification is requested, whether such documents are located in Canada or elsewhere. Pursuant to this directive, we further request that you advise us whether Gulf Minerals Canada Limited would be permitted under the Uranium Information Security Regulations to provide General Atomic Company with an identification of responsive documents in order that it may submit such identification to United Nuclear Corporation in this litigation. Where the document itself has not been previously produced to United Nuclear Corporation, the required identification would include:

(a) A description of the document by its title, date, originator(s) and recipient(s) and all persons who wrote, signed, initialed, dictated or otherwise participated in creating the same;

(b) Summary of contents; and

(c) The identity and address of the current custodian.

The Court has directed General Atomic Company to produce and identify all responsive documents on or before October 20, 1977. In view of this deadline, we would appreciate receiving at your earliest convenience your decision with respect to this request for the release of these materials and this information so that we can immediately communicate with the Court in regard to this matter. To expedite this request, we are telecopying to you a copy of this letter as well as mailing this letter to you by air mail, special delivery.

If you should require any additional information in order to act on this request, please advise us directly and we will respond forthwith.

Yours respectfully,

/s/ John Bodner, Jr.
JOHN BODNER, JR.
STEPHEN A. NYE
HOWREY & SIMON
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 783-0800

Attorneys for General Atomic Company

APPENDIX H

Ottawa, Ontario
K1A OE4

19 October 1977

Mr. John Bodner, Jr.
Barrister and Soliciter
c/o Howrey and Simon
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Dear Mr. Bodner:

United Nuclear Company v. *General Atomic Company, et al.* (No. 50827);
Uranium Information Security Regulations

In your letter of October 13, 1977, you requested on behalf of General Atomic Company, that I give my consent under section 2(a)(ii) of the Uranium Information Security Regulations, SOR 76-644, to the production of documents relating to the uranium marketing arrangement in response to an Order of the District Court for the County of Santa Fe in the State of New Mexico. The documents in question are now in the possession of Gulf Minerals Canada Limited in Canada.

As you may know, the Regulations have recently been changed, although, the effect of the revised Regulations, a copy of which is enclosed, is the same insofar as the documents mentioned above are concerned.

As the production of the documents referred to above would be contrary to the policy of the Government of Canada in this matter, I hereby refuse your request. In respect of the policy of the Government of Canada, I enclose a copy of a statement I made on the subject on October 14, 1977.

In your letter you ask whether compliance with paragraph 1 of the Order of the Court insofar as it provides for the identification of documents located in Canada, would contravene the Uranium Information Security Regulations. I am advised that compliance with the Court's order by Gulf Minerals Canada Limited in the manner described in your letter, would be a violation of the Regulations.

Yours sincerely,

/s/ Alastair Gillespie
ALASTAIR GILLESPIE

APPENDIX I

HOWREY & SIMON
Washington, D.C. 20006

November 8, 1977

The Honorable Alastair W. Gillespie
Minister of the Department of
Energy, Mines & Resources
Ottawa, Ontario KIA OE4

Re: Amended Request for Consent under the Canadian Uranium Information Security Regulations

Dear Mr. Minister:

In a letter dated October 13, 1977, and in accordance with a direction of the District Court for the County of Santa Fe, State of New Mexico, we requested on behalf of General Atomic Company that you consent to the release of those documents relating to the foreign uranium marketing arrangement in the possession of Gulf Minerals Canada Limited which were responsive to certain interrogatories propounded by plaintiff in *United Nuclear Corporation* v. *General Atomic Company*. We also requested that you advise us whether Gulf Minerals Canada Limited would be permitted to provide General Atomic Company with an identification of responsive documents, including a summary of the contents of each, so that it could submit such identification to plaintiff United Nuclear Corporation. In a letter dated October 19, 1977, you advised us that the release and the identification of documents in the manner requested were prohibited by the Uranium Information Security Regulations, SOR-76-644. Our October 13 request and your subsequent denial are attached hereto.

This amended request pertains to the identification, but not the release, of responsive Canadian documents. Our initial request asked for identification of documents as defined by plaintiff in its interrogatories, including a "summary of contents" of each document. After being informed of your denial, plaintiff filed a motion with the Court seeking an order requiring General Atomic Company to identify documents without a "summary of contents." Plaintiff argues to the Court that our October 13 request to you intentionally included a request for a "summary of contents" in order to prompt a denial of our request.

Accordingly, to assure that the Court will accurately understand the decision of the Department of Energy, Mines and Resources, we request that you consent under the Uranium Information Security Regulation for Gulf Minerals Canada Limited to provide General Atomic Company with the (a) date, (b) author, (c) addressee, (d) recipients, and (e) subject matter, without summary of contents, of each of the documents in question.

There are enclosed for your information Plaintiff's Motion for Order Compelling Identification and Production of Documents and Finding all Facts Provable from Canadian Documents Against Gulf and GAC, together with supporting memorandum filed on November 4, 1977.

We would appreciate receiving a reply to this letter at your earliest convenience.

Respectfully submitted,

/s/ John Bodner, Jr.
JOHN BODNER, JR.
STEPHEN A. NYE
Attorneys for General
Atomic Company

ak
Attachments

APPENDIX J

Ottawa, Ontario
K1A OE4

Dec. 6, 1977

Mr. John Bodner, Jr.
Barrister and Solicitor
c/o Howrey and Simon
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Dear Mr. Bodner:

United Nuclear Company v. *General Atomic Company, et al* (No. 50827);
Uranium Information Security Regulations

In your letter of November 8, 1977, you requested that I consent under section 2(a)(ii) of the Uranium Information Security Regulations, to the identification, by Gulf Minerals Canada Limited to General Atomic Company, of documents relating to the uranium marketing arrangement now in the possession of Gulf Minerals Canada Limited in Canada.

I enclose a copy of the decision of His Honour Mr. Justice Evans Chief Justice of the High Court of Ontario, in *Joe Clark et al* v. *Attorney-General of Canada.* As you will note in reading the above decision, His Honour Mr. Justice Evans concluded that section 2(a)(ii) of the Regulations was *ultra vires* the Atomic Energy Control Board and the Governor in Council under section 9 of the *Atomic Energy Control Act.* As a result of that decision, I am not able to consider your request.

Your sincerely,

/s/ Alastair Gillespie
ALASTAIR GILLESPIE

Encls.

APPENDIX K

[Emblem]

Energy, Mines and Resources Canada
Minister

Energie, Mines et Resources Canada
Ministre

Ottawa, Ontario
K1A OE4

Mr. R. N. Taylor
President
Gulf Minerals Canada Limited
Suite 1400, 110 Yonge Street
Toronto, Ontario
M5C 1T4

Dear Mr. Taylor:

GENERAL ATOMIC COMPANY:
URANIUM INFORMATION SECURITY REGULATIONS

I have recently learned of a decision of the District Court for the County of Santa Fe in the State of New Mexico, which I regard with considerable concern. As I understand the situation, General Atomic Company a U.S. company, is being ordered to produce and identify clearly and definitively documents that are in Canada in the possession of Gulf Minerals Canada Limited, notwithstanding that such production or identification is prohibited by the provisions of the Uranium Information Security Regulations. In the event that General Atomic Company does not comply with the order, there are as I understand the Order of the Court, a number of consequences with respect to findings of fact that would be made against General Atomic Company, which would follow.

As you may know, on October 13, 1977, I received a request from Counsel for General Atomic Company that

I give my consent pursuant to subsection 2(a)(ii) of the Regulations, now subsection 3(a)(ii) in the revised Regulations, to the release of material in the possession of Gulf Minerals Canada Limited. In a letter dated October 19, 1977, I refused that request on the basis that to give my consent would be contrary to the policy of the Government of Canada in the matter.

Subsequently, His Honour Mr. Justice Evans, Chief Justice of the High Court of Ontario, in his judgment in *Joe Clark et al* v. *Attorney General of Canada*, ruled that subsection 2(a)(ii) of the Regulations was "ultra vires" the Atomic Energy Control Board and that that subsection must be struck out of the Regulations.

As a consequence of that ruling, I do not have any authority to consent to the release of material falling within the provisions of the Regulations. Thus, the only exception to the prohibition set out in the Regulations is where the release of such material or the disclosure or communication of the contents thereof, is required by or under a law of Canada.

I am sure that you are aware that the Government of Canada is very concerned about attempts by courts in the United States to extend their jurisdiction into Canada. In view of the decision of the District Court in New Mexico, I take this opportunity to point out to you that the provisions of the Regulations effectively prohibit Gulf Minerals Canada Limited from assisting General Atomic Company in complying with the Order of the District Court in New Mexico, by producing, or identifying, documents coming within the provisions of the Regulations.

Yours sincerely,

/s/ Alastair Gillespie
ALASTAIR GILLEIPIE

APPENDIX L

IN THE DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

No. 50827

UNITED NUCLEAR CORPORATION,
Plaintiff,

vs.

GENERAL ATOMIC COMPANY, *et al.*,
Defendants.

ORDER

This matter coming on for consideration by the Court upon the oral motion of defendant, General Atomic Company, made in open court to vacate and set aside the Court's order of November 18, 1977, with respect to the identification of certain documents located in Canada and the entry of adverse finding of facts against, and the preclusion of evidence by defendant, General Atomic Company; the Court having considered said motion, supporting affidavits and documents and the responses of the other parties herein and the memoranda of arguments and authorities filed by the various parties hereto, and being fully advised in the premises, Finds:

1. The aforesaid order of this Court made and entered herein on November 18, 1977 only affords unto the plaintiff herein the legitimate right to discovery on an equal and the same basis and to the same extent as those rights have been secured herein unto defendant, General Atomic Company, and all other parties hereto.

2. In the entry of the aforesaid order of November 18, 1977, only the law of New Mexico was followed, without anything in said order requiring anything of any foreign sovereign or of any person of any act in violation of any laws of a foreign sovereign.

3. Alternatively, should identification of the aforesaid documents housed in Canada, *at this time* be deemed to constitute a violation of Canadian law, which premise has not been shown to the satisfaction of this Court, still the order of November 18, 1977 must stand as the predicate to appropriate relief under Rule 37 of the Rules of Civil Procedure and in keeping with the Court's prior rulings herein.

4. Due process of law demands that the disparity between the parties hereto in their rights to discovery be eliminated, and identification of the documents in question is one of the rights of discovery to be secured as provided by law.

To meet the dilemma of disparity in the right of discovery thus presented, by (1) granting the motion of defendant, General Atomic Company to vacate and set aside this Court's order of November 18, 1977, or (2) to order the identification of such documents, expressly by violating Canadian law, would amount to a convolution of all principles of due process of law as well as disregarding public policy against commission of crime, finding support only in sophistry.

Due process of law, in this dilemma, finds its true answer and solution in identifying the documents in question without violating Canadian law, and, alternatively, if that cannot be accomplished, through appro-

priate relief under Rule 37 of the Rules of Civil Procedure.

IT IS THEREFORE ORDERED that the aforesaid motion of the defendant, General Atomic Company, be and it hereby is denied.

/s/ Edwin L. Felter
District Judge

APPENDIX M

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO
SANTA FE COUNTY

Wednesday, February 1, 1978

No. 11,775

UNITED NUCLEAR CORPORATION,
Plaintiff-Appellee,
vs.
GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,
Defendant-Appellant,

INDIANA AND MICHIGAN ELECTRIC COMPANY, and
THE DETROIT EDISON CO.,
Defendants-Appellees.

No. 11,777

STATE OF NEW MEXICO, EX REL.
GENERAL ATOMIC COMPANY,
Petitioner,
vs.
HON. EDWIN L. FELTER,
Respondent.

ORIGINAL MANDAMUS AND PROHIBITION UNDER POWER OF SUPERINTENDING CONTROL

This matter coming on for consideration by the Court upon Motions of Petitioner and Appellant for Stay of Proceedings, and the Court having considered said motions and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that the motions to stay the trial be and the same are hereby denied.

IT IS FURTHER ORDERED that the trial court be and the same is hereby directed to allow the parties sufficient time prior to the entry of any order or findings of facts based upon its order of November 16, 1977 entered in Cause No. 50827 on the Civil Docket, Santa Fe County District Court, to present to this Court additional motions as may be appropriate.

ATTEST: A TRUE COPY

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX N

IN THE SUPREME COURT STATE OF NEW MEXICO

No. 11775

UNITED NUCLEAR CORPORATION,
Plaintiff-Appellee,

vs.

GENERAL ATOMIC COMPANY, a Partnership Composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,
Defendant-Appellant.

No. 11777

STATE OF NEW MEXICO, *ex rel.*
GENERAL ATOMIC COMPANY,
Petitioner,

vs.

HONORABLE EDWIN L. FELTER, District Judge, First Judicial District, State of New Mexico,
Respondent.

Wednesday, February 1, 1978

JUSTICE EASLEY: Mr. Montgomery, I'm wondering, wouldn't it be a better remedy for everyone concerned, if we do anything on this, to ask the Judge not to enter his findings that he makes until you've had time enough to come up here and [18] let us know what he's done, rather than speculate what he would do?

MR. MONTGOMERY: The problem there, your Honor, is I don't know whether we could come to the Court under the ordinary appeal processes until after conclusion of the trial and on appeal from the final judgment.

JUSTICE EASLEY: Of course, what I'm concerned about is that you're here now and you were here before. You don't know what Judge Felter is going to do in his findings. Why not come here after he has determined what he is going to have in the findings and give us a chance to see what he has decided to do?

MR. MONTGOMERY: That is a dilemma, your Honor, that the parties are faced with, and I admit it is a dilemma that we face because of the ambiguity which Justice Payne speaks of as talking out of both sides of one's mouth. The reason is because once the findings are entered, everyone in the world is told there was this conspiracy, that the Judge has found this, and General Atomic Company participated in it. It is now available for use in collateral estoppel. We can contest it, but attempts will be made to use it. It will bring about freely adverse publicity, which would harm the defendant in the conduct of all of its business relationships.

JUSTICE EASLEY: Have you talked to Judge Felter about [19] delaying the entry of his findings until you've had time to examine them, to come here with them?

APPENDIX O

IN THE DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

No. 50827

UNITED NUCLEAR CORPORATION,
Plaintiff,

vs.

GENERAL ATOMIC COMPANY, *et al.*,
Defendants.

NOTICE

To Each of the Parties to the Above-Entitled and Numbered Case, GREETINGS:

Pursuant to the mandate of the New Mexico Supreme Court in Cause No. 11,775 on its docket, entered on February 1, 1978, you and each of you are hereby notified that all motions relating to cartel documents, then pending and awaiting decision by the Court, will be acted upon by the Court on or after March 1, 1978. On or after March 1, 1978, the Court, in the exercise of its discretion and judgment, will enter such orders, findings, sanctions or judgments, or granting or denial or deferment of such motions, as to the Court then appears to be just and lawful.

Before any such action is or shall be taken by the Court in reference to such motions pending before it, and in keeping with the aforesaid mandate of the New Mexico Supreme Court, all parties to this case are allowed time until and including February 28, 1978 within which to file in the New Mexico Supreme Court, any additional motions they may deem proper.

Any action to be taken by this Court as herein mentioned, will not be taken under any procedure or procedures of secrecy, but will be taken in open court in accordance with constitutional and due process of law requirements of open and public trials.

A copy of this Notice shall be served in open court upon counsel for each of the parties to this case this 16th day of February, 1978.

/s/ Edwin L. Felter
District Judge

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-1236 and 77-1269

GENERAL ATOMIC COMPANY,
Petitioner,

v.

EDWIN L. FELTER, ETC., ET AL.,
Respondents.

On Petitions for Writs of Certiorari to the Supreme Court of New Mexico

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BRIEF FOR RESPONDENT UNITED NUCLEAR CORPORATION IN OPPOSITION

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April 17, 1978

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-1236 and 77-1269

GENERAL ATOMIC COMPANY,
Petitioner,

v.

EDWIN L. FELTER, ETC., ET AL.,
Respondents.

On Petitions for Writs of Certiorari to the Supreme Court of New Mexico

---

BRIEF FOR RESPONDENT UNITED NUCLEAR CORPORATION IN OPPOSITION

The petitions in Nos. 77-1236 and 77-1269 concern related orders in the trial court and related petitions for extraordinary writs in the New Mexico Supreme Court. Accordingly, United Nuclear Corporation, a respondent pursuant to Supreme Court Rule 21(4), is filing this single brief in opposition to the two petitions.[1]

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[1] Petitioner has also filed a petition for writ of mandamus, with accompanying motion, in No. 77-1237. Though the petition in No. 77-1269 states that it is supplementing that motion and petition as well as the petition in No. 77-1236, the subject of the petition for writ of mandamus is sufficiently distinct that UNC is responding in a separate brief in opposition.

OPINIONS BELOW

In addition to the opinions and orders cited in the petitions, the New Mexico District Court entered an Amended Sanctions Order and Default Judgment on March 27, 1978, in response to petitioner's motion for, *inter alia*, reconsideration of the Sanctions Order and Default Judgment that is a subject of the petition in No. 77-1269 (Pet. No. 77-1269 App. 2a); the March 27 order appears in the Appendix, *infra*, at 1a. The District Court's further order of March 27 that, *inter alia*, denied the motion for reconsideration except to the extent reflected in the Amended Sanctions Order and Default Judgment, appears in the Appendix, *infra*, at 23a. On April 4, 1978, the District Court entered a Declaratory Judgment as to Issues between United Nuclear Corporation and General Atomic Company, based upon the Amended Sanctions Order and Default Judgment, which Declaratory Judgment was entered as a final judgment pursuant to Rule 54(b)(1) of the New Mexico Rules of Civil Procedure so as to facilitate an immediate appeal. The Declaratory Judgment appears in the Appendix, *infra*, at 25a. None of these orders is reported.

QUESTIONS PRESENTED

(1) Whether this Court should review a State Supreme Court's denial, without opinion, of a petition for extraordinary writ of mandamus and prohibition requesting it to vacate an interlocutory discovery order that has been superseded by a subsequent sanctions order and default judgment and, thereafter, by a final declaratory judgment.

(2) Whether the State Supreme Court's denial, without opinion, of a petition for extraordinary writ of mandamus and prohibition rested upon an independent and adequate state ground.

(3) Whether a state trial court may, consistent with the Constitution and the act of state doctrine, enter a discovery order for the identification of relevant documents located in a foreign country, when the party subject to that order questions the lawfulness of such identification under a law of the foreign country.

(4) Whether a State Supreme Court is required by the Due Process Clause of the Fourteenth Amendment to issue an extraordinary writ directing a state trial court to submit for review any order it might enter imposing sanctions for violations of discovery orders, prior to the entry of such an order.

(5) Whether this Court should review, by common law writ of certiorari, a sanctions order and default judgment entered by a state trial judge for violation of discovery orders, when that order has not yet been reviewed by direct appeal to any State appellate court.

STATEMENT

The underlying state proceeding in this case is a suit by respondent United Nuclear Corporation ("UNC") against petitioner General Atomic Company ("GAC") in the District Court for the State of New Mexico, First Judicial District, Santa Fe County, for damages and for a declaratory judgment that certain contracts providing that UNC supply GAC with uranium are void under the common law and statutory law of the State.

The complaint was filed in December 1975, and trial commenced on October 31, 1977. Default judgments on all issues except damages were entered against GAC and in favor of UNC and the Indiana & Michigan Electric Company ("I&M")[2] on March 2, 1978 (Pet. No. 77-1269

[2] I&M is a party defendant and cross-claimant against GAC. I&M is also filing a brief in opposition to these petitions, with which UNC generally agrees.

App. 2a), and amended on March 27, 1978 (App., *infra*, 1a). Final declaratory judgment as to issues between UNC and GAC was entered on April 4, 1978 (*id.* 25a). Trial is continuing on the issue of damages; UNC has a net claim of approximately $200,000.

GAC's first petition (No. 77-1236) seeks a writ of certiorari to review a January 11, 1978 order of the New Mexico Supreme Court denying, without opinion, a GAC petition for writ of mandamus and prohibition under that court's constitutional "power of superintending control" over inferior courts. (Pet. No. 77-1236 App. 1a.) That petition sought review, through extraordinary writ, of an interlocutory discovery order entered on November 18, 1977 (*id.* App. 2a-5a), now superseded by the Sanctions Order and Default Judgment of March 2, 1978 (Pet. No. 77-1269 App. 2a), as amended on March 27 (App., *infra*, 1a), and by the final declaratory judgment of April 4, 1978 (App., *infra*, 25a).

GAC's second petition (No. 77-1269) seeks a writ of certiorari to review a March 2, 1978 order of the New Mexico Supreme Court denying, again without opinion, a motion by GAC. That motion sought reconsideration of the order of January 11, 1978, and sought to impose a requirement that the District Court certify to the State Supreme Court any proposed sanctions order prior to entry by the District Court. (Pet. No. 77-1269 App. 1a.) It also purports to seek a common law writ of certiorari, pursuant to 28 U.S.C. § 1651, to review the Sanctions Order and Default Judgment entered by the District Court on March 2, 1978, and amended on March 27, after the filing of the petition in No. 77-1269.

GAC's two petitions contain lengthy descriptions of the proceedings in the trial court and statements about the course of litigation.[3] It should be noted, however, that no

[3] GAC's petitions contain a number of allegations that we consider to be inaccurate and misleading and unfairly disparaging of the trial judge's conduct of the proceedings. By declining to address each such allegation and unduly lengthen this brief, we do not wish to be understood to accede to any part of GAC's portrait of the proceedings below.

record was filed in the New Mexico Supreme Court. The only presently effective findings of fact by any court in this action are those in the District Court's Sanctions Order and Default Judgment of March 2, 1978, as amended on March 27. While GAC disagrees with many of those findings (Pet. No. 77-1269 at 12), it concedes that they "will first have to be reviewed, upon a careful consideration of the full record, in the New Mexico appellate courts." *Id.* Those findings, in other words, must be taken as true in this Court's consideration of GAC's petition for writs of certiorari. Accordingly, the following description of the proceedings below incorporates relevant facts in the Recitals of the Amended Sanctions Order and Default Judgment.

A. Early Discovery Proceedings

UNC's complaint in December 1975 alleged, among other things, that a 1973 uranium supply agreement was void as a result of fraud, economic coercion, breach of fiduciary duties,[4] and violations of the New Mexico antitrust laws. Further, UNC claimed that performance of the agreement was excused because it was commercially impracticable.[5] UNC simultaneously served its first set of interrogatories on GAC, seeking information relating to "negotiations" and "agreements" pertaining to the "marketing and sale" of uranium. The interrogatories specifically requested information from the constituent part-

[4] From 1971 to 1973, UNC and Gulf Oil Corporation were co-owners of a joint venture corporation known as Gulf United Nuclear Fuels Corp.

[5] In April 1976, the complaint was amended to include claims that a 1974 agreement between UNC and GAC was void upon similar grounds.

ners of GAC, Gulf Oil Corporation ("Gulf") and Scallop Nuclear, Inc. Recitals 1, 2, App., *infra*, 3a.

Although it received an extension of time, GAC failed timely to answer or object to the interrogatories, and in March 1976 UNC filed its first application for a default judgment. The parties thereupon entered into an agreement signed by counsel for UNC, GAC and Gulf, in which UNC agreed to withdraw its application for default judgment and GAC agreed to "answer in good faith all interrogatories to Defendant presently pending in this action" and to produce documents. Recital 3, App., *infra*, 4a. Yet on April 2, 1976, GAC filed "wholly inadequate and evasive answers to the Interrogatories" and failed to produce relevant documents. Recital 5, *id.* 4a-5a. On August 6, 1976, UNC filed a second motion for default, based on the discovery failures. Although that motion was denied, the court warned the parties that it would impose sanctions should any party fail to make discovery in good faith. Recitals 8, 11, *id.* 5a, 6a.

GAC suggests that it was not until a year later, in August 1977, that it was put on notice that UNC sought the production of certain documents of GAC and Gulf that related to the participation of GAC and Gulf in an international uranium cartel that fixed prices, allocated markets, and discriminated against middlemen, in the United States and elsewhere. See Pet. No. 77-1236 at 4, 5.[6] The District Court, however, has repeatedly ruled to the contrary, finding that the cartel documents were indeed covered by the first set of interrogatories and the

[6] GAC states that "[t]he alleged 'international cartel' was in fact an international uranium marketing arrangement *established and enforced* by foreign governments, including the Government of Canada." Pet. No. 77-1236 at 4 (emphasis added.) This characterization is contrary to the findings of fact entered as a sanction in this action (Finding 2, App., *infra*, 18a) and is contrary to the evidence before the District Court.

March 1976 agreement to produce. Recitals 4, 44, App., *infra*, 4a, 16a.

Although GAC represented under oath on April 2, 1976, that the business records of Gulf and Scallop would be produced on June 20, 1976 (Recital 5, App., *infra*, 4a-5a), and the District Court held on April 30, 1976, that the parties were bound by the March 1976 discovery agreement (Recital 6, *id.* 5a), GAC continued to fail to answer or to produce cartel documents covered by the first set of interrogatories and by the March agreement. Rather, GAC "deliberately concealed the existence of evidence which it knew to be highly relevant to the antitrust issues pleaded in UNC's Complaint and stressed by counsel throughout the discovery period.' Recital 10, *id.* 6a. This "intentional and willful action, * * * a violation of UNC's discovery rights and the Orders" of the District Court (*id.*), occurred prior to the adoption of the Uranium Security Regulations by Canada on September 23, 1976 (Recital 9, *id.* 5a), at times when "no law of the United States or Canada prohibited" production of the cartel documents (Recital 4, *id.* 4a).

In August 1977, UNC served a second set of interrogatories specifically designed to elicit all facts about the cartel. A motion to produce all documents identified in the answers to those interrogatories was filed at the same time, and GAC agreed to produce those documents. After an extension of time, the greater portion of GAC's answers to the interrogatories was adjudged "defective, incomplete, inadequate and unacceptable." Order of October 11, 1977, Pet. No. 77-1236 App. 28a, 29a; Recitals 14, 15, App., *infra*, 7a.

This October 11 order also responded to GAC's contention that release or disclosure of the requested cartel documents, to the extent that those documents were then housed in Canada, would violate the Canadian Uranium Information Security Regulations, promulgated on Sep-

tember 23, 1976, some nine months after UNC's first set of interrogatories.[7] The order required GAC to "clearly and definitively identify all documents," whether or not housed in Canada, but required production of requested documents only "[i]nsofar as it is lawful so to do." It further directed GAC to make "an immediate diligent and good faith effort" to obtain a lawful waiver or dispensation if Canadian regulations prohibited production of Canadian documents. Order of October 11, 1977, Pet. No. 77-1236 App. 32a-33a. Finally, the order reiterated a warning given on several earlier occasions (Recital 11, App., *infra*, 6a) that failure to make full compliance with discovery orders would subject any party to sanctions under Rule 37 of the New Mexico Rules of Civil Procedure, which is substantially similar to Federal Rule 37.

B. The November 18, 1977 Discovery Order

In a second set of answers, filed October 20, 1977, to the second set of interrogatories GAC refused again to identify or produce cartel documents located in Canada. Recital 16, App., *infra*, 7a. UNC moved again, on November 4, 1977, for an order compelling identification of the documents and for a sanctions order, finding all facts provable from the documents against GAC. In response, and after an evidentiary hearing on November 14 and 16, the District Court issued the November 18, 1977 order that was the subject of GAC's January 5, 1978 petition for an extraordinary writ in the New Mexico Supreme Court. Although GAC states that, prior to this order, it "tried in good faith to secure a waiver with respect to the documents" located in Canada, Pet. No. 77-1236 at 7, the District Court found that the terms of its October 11 order "were not performed or complied with but rather they were sought to be avoided." *Id.* App. 3a; see also Recital 27, App., *infra*, 12a. Moreover, GAC's

[7] The regulations appear at Pet. No. 77-1269 App. 86a.

failure to produce was "caused in part, by its own early and deliberate policy of housing such documents in Canada * * *." Pet. No. 77-1236 App. 3a.

The November 18, 1977 order again required that GAC "identify, clearly and definitively, all documents housed in Canada." Pet. No. 77-1236 App. 4a. The order next stated:

> "All facts provable from documents housed in Canada which are not produced and which are the subject of said motion are found against Defendant, [GAC,] and said defendant is precluded from offering evidence herein in opposition to such findings of fact; subject, however, to the other provisions of this order." *Id.*

The remainder of the order set a briefing schedule for proposed findings of fact to be determined on the basis of nonproduction of the cartel documents.

C. The December 27, 1977 Discovery Orders

GAC moved to vacate the November 18, 1977 discovery order, primarily on the basis of the "personal opinion" of a Canadian Minister given in a written response to a letter from GAC. GAC relied on this opinion even though it knew that the Minister had "been determined by the courts of Canada to have no authority to interpret or deal with the Uranium Security Regulations." Recital 28, App., *infra*, 12a. Two diplomatic notes from the Government of Canada were also transmitted to the District Court by the Department of State. Pet. No. 77-1236 App. 8a-12a. It should be noted, however, that the Department of State stated that, in transmitting the views of the Canadian Government, it was taking

> "no position with regard to any of the issues raised in either of the two notes. Transmittal of these documents should not be understood as having implica-

tions with respect to the foreign affairs of the United States." *Id.* App. 8a.

On December 27, 1977, the District Court denied GAC's motion to vacate the November 18 order. Pet. No. 77-1236 App. 44a-46a. The court noted that that order had not required "anything of any foreign sovereign or of any person of [*sic*] any act in violation of any laws of a foreign sovereign." *Id.* App. 45a. "Alternatively," however, it went on to say:

> "should identification of the aforesaid documents housed in Canada, *at this time* be deemed to constitute a violation of Canadian law, which premise has not been shown to the satisfaction of this Court, still the order of November 18, 1977 must stand as the predicate to appropriate relief under Rule 37 of the Rules of Civil Procedure * * *." *Id.* (emphasis in original).

In a second order on December 27, in response to a motion by I&M to compel further answers to UNC's second set of interrogatories, the District Court again directed GAC to answer "completely, in good faith, and without evasion," and warned GAC that, if it failed or refused to comply, any aggrieved party could apply for appropriate sanctions under Rule 37. Recital 18, App., *infra*, 7a-8a.

D. GAC's Petition for Extraordinary Writ in the New Mexico Supreme Court

On January 5, 1978, GAC filed in the New Mexico Supreme Court a petition for writ of mandamus and prohibition under that court's constitutional power of "superintending control over all inferior courts" (hereinafter "N.M. Pet."). N.M. Const., Art. VI, § 3. The petition urged that the November 18, 1977 discovery order required violation of Canadian law; raised "questions of the jurisdiction of a state court to impose sanctions for non-production" of the documents in question; unconstitutionally interfered with the conduct of United States foreign relations; and departed from the act of state doctrine. N.M. Pet. 6-9.

GAC requested (a) an "alternative writ" of mandamus and prohibition directing the trial judge to vacate the November 18 order or to show cause why that order should not be vacated;[8] (b) an immediate stay of proceedings in trial court "pending final disposition of this petition"; and (c) an order that the record and briefs on the merits be filed in the Supreme Court. *Id.* 33-34, and accompanying proposed alternative writ.

The petition was argued to the New Mexico Supreme Court on January 11, 1978. During argument, counsel for GAC acknowledged that it was "most unusual" for the Court to exercise its power of superintending control, adding: "I think the Court has only done this five times in the history of the Court * * *." Tr. 1/11/78 at 68. That same day, the Court denied GAC's petition without opinion. Pet. No. 77-1236 App. 1a. This denial is the subject of GAC's petition for writ of certiorari in this Court in No. 77-1236.

E. GAC's Application for a Stay of Trial Court Proceedings

On January 26, 1978, GAC filed a "motion for stay of proceedings" in the New Mexico Supreme Court, asking it to stay proceedings in the trial court pending resort by GAC to this Court or, in the alternative, to stay entry of any findings of fact as a sanction pending further orders of the New Mexico Supreme Court.

After argument on February 1, 1978, the New Mexico Supreme Court denied the motion but further ordered:

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[8] Under New Mexico prc edure, an "alternative writ" ordinarily orders the trial judge either to perform certain acts or to show cause why he should not be required to do so by a "permanent writ." Thus an "alternative writ" is the functional equivalent of a show cause order directed to the trial judge.

"that the trial court be and the same is hereby directed to allow the parties sufficient time prior to the entry of any order or findings of fact based upon its order of November 16 [*sic*], 1977 * * * to present to this Court additional motions as may be appropriate." Pet. No. 77-1269 App. 29a-30a.

F. Further Proceedings in Trial Court on Motion for Sanctions and Default Judgment

On February 2, 1978, after two extensions of time, GAC filed its third set of answers to UNC's second set of interrogatories. These answers were found to be "unresponsive and evasive," and "mere legal argument" in many instances. In addition, they violated the express terms of the order of October 11, 1977, in that GAC refused to commit itself to a set of facts even when documents were available to the parties. See Recitals 19-20, App., *infra*, 8a. In addition, in the face of its continuing obligation to produce relevant documents and even though the trial was in progress, GAC did not produce certain cartel documents located in the United States or reveal their existence to the court or the parties until UNC discovered their existence from other sources. Recitals 22-23NA, App., *infra*, 9a-11a.

Accordingly, on February 10, UNC moved again for default judgment, based on the accumulated violations of discovery orders. Pursuant to the November 18 order, the parties filed on February 15 more than 800 pages of briefs regarding UNC's proposed findings of fact.

On February 16, 1978, in keeping with the February 1, 1978 order of the New Mexico Supreme Court, the District Court issued a Notice (Pet. No. 77-1236 App. 51a) that it would act upon all pending motions on or after March 1, 1978, and that the court would, at that time, "enter such orders, findings, sanctions or judgments, or granting or denial or deferment of such motions, as to the Court then appears to be just and lawful." It added

that before any action would be taken on such motions, "and in keeping with the aforesaid mandate of the New Mexico Supreme Court, all parties to this case are allowed time until and including February 28, 1978, within which to file in the New Mexico Supreme Court, any additional motions they may deem proper." *Id.* App. 52a.

G. GAC's Motion for Stay, Certification, and Reconsideration in the New Mexico Supreme Court

GAC seized the opportunity offered and, on February 20, 1978, filed an unverified motion in the proceeding it had earlier initiated in the New Mexico Supreme Court by its January 5 petition. That motion sought partial reconsideration of the denial of the earlier petition and issuance of an alternative writ of mandamus and prohibition (a) staying the entry of any findings of fact or other sanctions against GAC until further order of the State Supreme Court, and (b) directing the trial judge to certify to the court, prior to entry, any proposed findings of fact or other sanctions that he intended to enter, so that the November 18 interlocutory order, "as amplified by such findings or other sanctions as may be certified to this Court," could be reviewed. GAC's proposed alternative writ would have directed the filing of a record and a briefing schedule. The only new matter presented was the argument that the trial judge had violated the New Mexico Supreme Court order of February 1, 1978, by not affording GAC a preview of any findings of fact or other sanctions that he intended to enter.

After oral argument on March 1, 1978, the New Mexico Supreme Court denied GAC's latest motion, without opinion, on March 2, 1978. Pet. No. 77-1269 App. 1a. This denial is the subject of GAC's petition for writ of certiorari in No. 77-1269.

H. The Sanctions Order and Default Judgment

On March 2, 1978, shortly after it learned that the New Mexico Supreme Court had denied GAC's motion, the

District Court entered a Sanctions Order and Default Judgment. Pet. No. 77-1269 App. 2a. The Court ruled that GAC had

> "followed a conscious, willful and deliberate policy throughout this litigation, which continues to the present time, in cynical disregard and disdain of the Rules of Procedure relating to discovery and this Court's discovery Orders, of concealing rather than in good faith revealing the true facts concerning the international uranium cartel * * *." *Id.* App. 2a-3a.

The factual basis for imposing sanctions under Rule 37 of the New Mexico Rules of Civil Procedure (*id.* App. 90a) was set forth in 44 recitals.

The recitals set forth the court's findings about the two-year history of GAC's discovery failures, in more detail than we have attempted herein. They find that GAC never informed the parties about the cartel, about Gulf's and GAC's participation therein, or about cartel documents, even though such disclosure was required long prior to the promulgation of the Canadian Uranium Security Regulations on September 23, 1976, long after such discovery was required. Recitals 4, 9, 24, 44-45, *id.* App. 5a, 6a, 10a, 16a-17a. The recitals also set forth GAC's refusals to produce domestic and foreign documents and to answer interrogatories, and its concealment of the existence of evidence, all in violation of outstanding discovery orders. Recitals 1-24, *id.* App. 4a-11a.

> "Based on all facts, the Court is forced to conclude, therefore, that GAC has followed a consistent pattern and practice of concealing, rather than revealing, highly relevant documents to the Court and to the parties here, and that such actions and practices have been contumacious, intentional, willful, deliberate and, in the utmost bad faith." *Id.* App. 11a.

The recitals also set forth the inadequacy of GAC's steps to comply with the court's orders that documents be produced or identified, if possible under Canadian law, Recitals 26-35, *id.* App. 12a-15a, and they find that

"GAC's actions demonstrate its actual intent to conceal the documentary evidence concerning the cartel rather than to produce it in good faith to the parties in this litigation and the Court." *Id.* App. 15a. They find, finally, that Gulf "followed a conscious and deliberate policy of housing the cartel documents in Canada," action that "amounts to deliberately courting or seeking legal impediments to the production of the records." *Id.* App. 15a-16a.

The District Court also entered twelve findings of fact as sanctions, to the effect, *inter alia*, that Gulf and GAC participated in an international uranium cartel from at least 1972 to 1975, the purpose and effect of which was to limit the supply, control production, allocate markets, and fix the price of uranium; that neither GAC nor Gulf and its subsidiaries were compelled by the Canadian Government to belong to the cartel; that Gulf and its subsidiaries and affiliates, pursuant to a cartel agreement, restricted production of uranium in New Mexico and monopolized New Mexico uranium reserves; that the uranium supply contracts with UNC were entered into by Gulf and GAC as part of an attempt to monopolize New Mexico uranium reserves; and that Gulf and GAC breached fiduciary duties owed to UNC. *Id.* App. 17a-21a.

The District Court ordered that judgment by default, except on the issue of damages, be entered against GAC in favor of UNC and I&M; that GAC's defenses and its counterclaim and crossclaim be stricken; and that the trial continue on the issue of damages.

This order is the subject of the request for common law writ of certiorari to the trial court incorporated in the petition for writ of certiorari in No. 77-1269. Pet. No. 77-1269 at 16.

I. Proceedings After March 2, 1978

On March 3, 1978, GAC filed its petition for writ of certiorari in No. 77-1236 and its petition for writ of

mandamus in No. 77-1237 (to which UNC is responding in a separate brief). At the same time, GAC filed in this Court an application to stay proceedings in the District Court (No. A-747), which was denied on March 20, 1978.

In the meantime, on March 13, 1978, GAC filed a motion in the District Court seeking reconsideration of the March 2 Sanctions Order and Default Judgment, or, alternatively, clarification thereof, or, as a final alternative, the amendment of that order so as to make it immediately appealable under Rule 54(b) of the New Mexico Rules of Civil Procedure (similar to Federal Rule 54(b)) and a stay of the trial on damages pending appeal.[9]

While this motion was pending, GAC filed, on March 15, 1978, the petition for writ of certiorari in No. 77-1269. On March 27, 1978, the District Court entered an Amended Sanctions Order and Default Judgment, correcting and amending several recitals. App., *infra*, 1a.[10] GAC's other requests for reconsideration, clarification, and stay were denied, except that the court reserved ruling on the request for the entry of a Rule 54(b) judgment. App., *infra*, 23a. On April 4, 1978, the District Court entered a final declaratory judgment as to all issues, except damages, between UNC and GAC pursuant to Rule 54(b). App., *infra*, 25a.

As of this writing GAC has not sought review of the Amended Sanctions Order and Default Judgment or the Declaratory Judgment in the New Mexico appellate courts. GAC has until May 4, 1978, to appeal.

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[9] The motion is attached to I&M's supplemental memorandum in opposition to GAC's application for a stay in No. A-747.

[10] For the most significant amendments, see Recitals 23-A, 24, App., *infra*, 10a-11a.

ARGUMENT

Both of GAC's petitions for writs of certiorari seek review of the refusals of the New Mexico Supreme Court to review—prior to the entry of any sanctions order—the November 18, 1977 interlocutory discovery order, which merely looked forward to the entry of sanctions and which has since been superseded by the Amended Sanctions Order and Default Judgment and the Declaratory Judgment based thereon. Even assuming that the actions of the New Mexico Supreme Court on January 11, 1978, and on March 2, 1978, are "final decisions" within the meaning of 28 U.S.C. § 1257,[11] both of those actions rested upon independent and adequate nonfederal grounds, so that no federal question is properly presented to this Court for review. Furthermore, the petitions present no substantial federal question, and the orders sought

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[11] This Court has stated that a suit for a writ of prohibition in a state appellate court is "an independent suit," *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 565 (1947), or "a distinct suit," *Bandini Petroleum Co.* v. *Superior Court*, 284 U.S. 8, 14 (1931), and that "the judgment finally disposing of it is a final judgment within the meaning of [§ 1257]," *id.* However, as a leading treatise states, "it might seem a perversion of the final judgment rule to allow the formally independent nature of extraordinary state collateral proceedings to establish finality. * * * If the same questions had been raised by interlocutory state appeal, review would have been denied." Wright, Miller, Cooper & Gressman, Federal Practice & Procedure: Jurisdiction § 4009 at 580 (1977). The petitions do not show that the New Mexico Supreme Court's actions fall within any of the four categories of decisions that may be final according to the pragmatic criteria recently enunciated in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 476-487 (1975). Nor do GAC's arguments against the November 18, 1977 interlocutory discovery order really go to the jurisdiction of the trial court to enter the order. Compare *Madruga* v. *Superior Court*, 346 U.S. 556, 557 n. 1 (1954), and *Fisher* v. *District Court*, 424 U.S. 382, 385 n. 7 (1976), the cases relied on by petitioner. Pet. No. 77-1236 at 16-17. It does not seem necessary to brief this jurisdictional question in detail, however, in view of the strength of the other grounds for denying the petitions.

to be reviewed are not in conflict with decisions of this Court or of the federal courts of appeals.

A. The Decisions of the New Mexico Supreme Court Rest on Independent and Adequate Nonfederal Grounds

The New Mexico Supreme Court concisely summarized New Mexico law on extraordinary writs of prohibition in an earlier proceeding in this case:

> "Prohibition is an extraordinary remedy which is granted only in limited circumstances at the discretion of the Court and is properly invoked to prevent an inferior court from acting either without jurisdiction or in excess of its jurisdiction. [Citations omitted.] This writ should be issued sparingly and only where irreparable harm, extraordinary hardship, costly delays, or unusual burdens of expense would result. [Citations omitted.] Prohibition, however, is not a substitute for an appeal nor can it be used merely to correct an erroneous decision of the district court. [Citations omitted.]" *General Atomic Company* v. *Felter*, 90 N.M. 120, 560 P.2d 541, 543 (1977), *reversed on other grounds*, 434 U.S. —— (Oct. 31, 1977) (No. 76-1640).

By its January 5, 1978 petition to the New Mexico Supreme Court, GAC asked that court to exercise its discretion and issue an alternative writ—similar to a show cause order—to the District Court (see p. 11, n.8, *supra*). Such action would have resulted in the filing of a record and briefs in the State Supreme Court on the issues in the petition concerning the validity of the November 18, 1977 order. UNC argued, among other things, that review of that order by extraordinary writ was inappropriate because, under New Mexico procedures, GAC had a remedy by appeal; it had not been irreparably injured; the order was purely interlocutory; GAC had never contended that the order was in excess of the trial court's jurisdiction; and factual issues not appropriate for review by extraordinary writ were involved. The New Mexico Supreme Court denied GAC's petition, without opinion, on January 11, 1978. As a result, no record was filed in the State Supreme Court, and there was no plenary briefing of the issues.

Accordingly, there is no reasonable likelihood that the action of the New Mexico Supreme Court that is the subject of the petition in No. 77-1236 rested on the rejection, on the merits, of any federal claim that GAC attempted to present. Although GAC's substantive arguments to the New Mexico Supreme Court were phrased as attacks on the jurisdiction of the state trial court to issue the discovery order, in fact they were claims only that the trial court erred, since its discovery order was issued under the New Mexico Rules of Civil Procedure in a case over which it has unquestioned jurisdiction. GAC's contention that the discovery order, or the sanctions order and default judgment that followed it, was in error are reviewable on direct appeal after a final judgment,[12] and GAC has never suggested the contrary.

In these circumstances, the traditional rule fully applies: "Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment." *Durley* v. *Mayo*, 351 U.S. 277, 281 (1956), quoting *Stembridge* v. *Georgia*, 343 U.S. 541, 547 (1952) (emphasis in original). See also *Williams* v. *Kaiser*, 323 U.S. 471, 477-78 (1945).[13]

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[12] Such an appealable final judgment, by virtue of a Rule 54(b) certification, was entered on April 4, 1978. App., *infra*, 25a.

[13] This case was previously before this Court on petition for writ of certiorari seeking review of another denial, without opinion, of an extraordinary writ by the New Mexico Supreme Court. This Court granted the writ of certiorari, and remanded to the State Supreme Court "to consider whether judgment is based upon federal or state grounds, or both." *General Atomic Company* v. *Felter*, 429 U.S. 973 (1976) (No. 76-385). On remand, the State Supreme

Nor is there any greater likelihood that the action of the New Mexico Supreme Court on March 2, 1978, that is the subject of the petition in No. 77-1269, rested on any federal ground. Besides asking reconsideration of the earlier denial of an extraordinary writ, GAC's last motion argued only that the trial court had violated the New Mexico Supreme Court's order of February 1, 1978, which directed the trial court to allow sufficient time for further motions to the State Supreme Court prior to the entry of a sanctions order.[14] Pet. No. 77-1269 at 29a. In this Court, however, GAC argues a different question:

> "The very least *the Due Process Clause* requires is the kind of procedure initially contemplated by the New Mexico Supreme Court, i.e., a disclosure of the proposed sanctions and a hearing, with appellate review before the sanctions are entered." Pet. No. 77-1269 at 15 (emphasis added).

Court stated that its decision rested on federal grounds, and this Court granted a second petition for writ of certiorari. See 434 U.S. —— (Oct. 31, 1977) (No. 76-1640).

By contrast with the instant matter, however, the New Mexico Supreme Court in that proceeding had issued the alternative writ sought by GAC, ordering the respondent to show cause why a writ of prohibition should not issue and ordering briefs and oral argument on the merits. Pet. No. 76-385 App. 7a. It was only after the filing of those briefs and oral argument that the court quashed the alternative writ as having been improvidently granted. Pet. No. 76-385 App. 9a; see No. 76-1640, slip op. at 3. The circumstances that justified a remand in that case are not present in the proceedings now under review. Even counsel for GAC, in the New Mexico Supreme Court, has referred to the January 11 action of that Court as "a *refusal* * * * *to consider* the question of whether this Order [the November 18 order of the District Court] was properly entered, whether this Order is constitutionally sound, whether this Order comports with due process * * *." Tr. 2/1/78 at 14-15 (emphasis added).

[14] GAC's contention (Pet. No. 77-1269 at 4-5), based upon a question during oral argument by a member of the New Mexico Supreme Court, that the February 1, 1978 order was intended to require the trial court to make any proposed sanctions available for review before filing, is refuted by that court's denial on March 2 of GAC's motion. See pp. 11-13 *supra*.

Leaving aside the absence of a single citation that supports this bizarre proposition of federal constitutional law, we note that the petition does not, as required by Supreme Court Rule 23(1)(f), "specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which," that federal question was raised.

The March 2, 1978 action of the New Mexico Supreme Court was like the action of January 11—a refusal to exercise its discretion to issue a show cause order and review on the merits, by extraordinary writ, issues reviewable on direct appeal. UNC pointed out in argument that, among other things, the court's rules do not provide for reconsideration of a denial of an extraordinary writ; GAC's motion was not verified as required by § 21-2-1(24)(2) of the New Mexico Statutes Annotated (1953); no irreparable injury had been demonstrated; and fact issues not appropriate for review by extraordinary writ were involved. Here, too, the court denied GAC's motion without opinion and declined to enter an alternative writ requiring the filing of the record, full briefing, and argument of the issues on the merits.

In short, the court's actions amounted to no more than a refusal to divert a complicated civil trial from regular appellate processes that would not be long delayed. These actions are quintessentially the kinds of decisions that should be presumed to have rested on independent and adequate non-federal grounds. Any other result would be a substantial federal interference with a State Supreme Court's right to save its power of issuing extraordinary writs for situations that in fact demand it.

B. The Federal Questions That GAC Presents are Insubstantial

The November 18, 1977 discovery order has now been superseded by the March 27 Amended Sanctions Order

and Default Judgment (only one of the premises of which is violation of the November 18 order). Yet GAC's petition in No. 77-1236 continues to seek review of that earlier interlocutory order. GAC argues that the order (a) violated the Due Process Clause as interpreted by this Court in *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958); (b) unconstitutionally intruded upon United States foreign relations; and (c) violated the act of state doctrine. In its petition in No. 77-1269, GAC argues that the Due Process Clause, under *Societe Internationale*, required the trial court to disclose in advance any sanctions it intended to enter in order to permit state appellate review prior to the entry of such sanctions. None of these contentions poses a substantial federal question.

1. *The Societe Internationale Decision and the Due Process Contentions.* In *Societe Internationale*, a suit by a Swiss holding company against the Attorney General for the return of assets seized under the Trading with the Enemy Act, the district court dismissed the complaint for failure to produce foreign bank records in response to a production order under the Federal Rules of Civil Procedure. Petitioner argued that disclosure of the records would have violated Swiss law, and that therefore the district court had no power to order their production or dismiss the complaint. In Part I of its opinion, however, this Court upheld the discovery order, ruling that a contrary result would, in addition to undermining the policies of the Trading with the Enemy Act, "invite efforts to place ownership of American assets in persons or firms whose sovereign assures secrecy of records." 357 U.S. at 205. In short, the Court upheld the propriety of a production order in the face of precisely the same kind of argument that GAC makes in this case.

In Part II of its opinion, this Court held that Rule 37 of the Federal Rules of Civil Procedure authorized the District Court to impose sanctions for failure to comply

with a production order, even if the failure was not willful. "[W]illfulness or good faith" was relevant to the severity of the sanction, not to the power of the court to enter the sanction itself. 357 U.S. at 208.

In Part III, this Court considered the propriety of dismissal in the particular case as a Rule 37 sanction. It noted that a Special Master, the District Court and the Court of Appeals had determined that the petitioner had acted in good faith, and that a due process issue was posed by the dismissal of a complaint "because of a plaintiff's inability, *despite good-faith efforts*, to comply with a pretrial production order." 357 U.S. at 210 (emphasis added). In conclusion, the Court reversed and remanded, saying:

> "* * * Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner." 357 U.S. at 212.

The teaching of *Societe Internationale* is clear and the actions of the New Mexico courts reflect a correct understanding of the decision: Even if compliance with an order compelling discovery may violate foreign law, that circumstance does not make the discovery order improper. The justifications for failing to comply with such an order are properly considered when the court is determining the appropriate sanction under Rule 37. And if the party refusing discovery has acted in good faith, then particularly severe sanctions, such as dismissal of a complaint, may be improper. In sum, a discovery order is no more than the necessary predicate to whatever sanctions may be appropriate.

The District Court's order of November 18, 1977, directed GAC to identify documents housed in Canada and, while it looked forward to the entry of sanctions

and established a briefing schedule for that purpose, it did not itself impose any sanctions. GAC's protestations that it could not produce or identify the Canadian documents without violating Canadian law, that it acted in good faith in attempting to obtain a release from or waiver of Canadian law, and that the due process concerns noted in *Societe Internationale* prevent the imposition of sanctions—all of these are relevant to the propriety of the Amended Sanctions Order and Default Judgment. But GAC admits that the sanctions order is not yet subject to review as a whole (see Pet. No. 77-1269 at 12), and no case cited by GAC holds that those concerns prevent the entry of the discovery order itself. While *Societe Internationale*, as we have seen, reversed a sanctions order, it held that the discovery order had been proper.

The only other decision with which GAC claims a conflict on the due process issue is *In re Westinghouse Electric Corp. Uranium Contracts Litigation*, 563 F.2d 992 (10th Cir. 1977). In that case, the District Court had imposed a sanction (contempt) after making a finding of bad faith. The Court of Appeals held that the finding of bad faith was clearly erroneous and reversed. Rather than supporting GAC's argument that good faith and adequate justification prohibit the entry of discovery orders involving foreign documents,[15] the case holds that such issues are relevant only to the severity of sanctions imposed. The court said:

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[15] GAC suggests a conflict with *Societe Internationale* and *In re Westinghouse Electric* on the grounds that GAC, like the parties opposing discovery in those cases, acted in good faith (see Pet. No. 77-1236 at 19). The factual findings of the District Court are explicitly to the contrary, the New Mexico Supreme Court undertook no independent review of GAC's conduct, and GAC has conceded that such factual issues "will first have to be reviewed, upon a careful consideration of the full record, in the New Mexico appellate courts." Pet. No. 77-1269 at 12.

> "We do not regard our disposition of the present controversy to be in anywise at odds with *Arthur Andersen & Co.* v. *Finesilver*, 546 F.2d 338 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 * * * (1977). It is true that in that case we held that the district court had not abused its discretion in entering a discovery order which required Arthur Andersen to produce certain documents, notwithstanding the fact that by the act of producing such records, Arthur Andersen would violate Swiss law. However, * * * *we recognized the distinction made in Societe between the power to order discovery and the imposition of sanctions for noncompliance.* In *Andersen* we left open the question of the effect of foreign law when the district court is considering the sanctions to be imposed for disobedience to the court's discovery order." 563 F.2d at 999 (emphasis added).

GAC attempts to evade the prematurity of its argument based on *Societe Internationale* in No. 77-1236 by arguing that the November 18, 1977 order was in fact a sanctions order. Pet. No. 77-1236 at 18. It relies on the following single sentence in that order:

> "2. All facts provable from documents housed in Canada which are not produced and which are the subject of said motion are found against Defendant, [GAC,] and said defendant is precluded from offering evidence herein in opposition to such findings of fact; subject, however, to the other provisions of this order." Pet. No. 77-1236 App. 4a.

The "other provisions" of the order set a briefing schedule on the findings of fact to be entered as sanctions. By the time those briefs were due, UNC had moved again for default, and the briefs filed concerned many other discovery violations occurring both before and after the November 18 order. The trial on all issues continued after the entry of the November 18 order and until the March 2 Sanctions Order and Default Judgment. There

can be no question that the operative sanctions order in this case—the decision that contains the District Court's detailed recitals about GAC discovery failures and its lack of good faith—is the March 2 Sanctions Order and Default Judgment, as amended on March 27. The November 18 order, including any role it might have had in the final imposition of Rule 37 sanctions, was interlocutory in every sense of the word.[16]

In No. 77-1269, petitioner argues that the March 2 Sanctions Order and Default Judgment has "ripened GAC's argument beyond any contention of prematurity," Pet. No. 77-1269 at 15. Elsewhere, however, GAC states that the recitals and findings of fact in the March 2 order "will first have to be reviewed, upon a careful consideration of the full record, in the New Mexico appellate courts." *Id.* 12. Given GAC's acceptance of the District Court's findings of bad faith, its argument here necessarily is the following: that *Societe Internationale* precludes the entry of any sanctions order and default judgment, when the identification or production of documents would violate foreign law, even though the sanctions order is based on many other discovery failures in the "utmost bad faith," some of which preceded adoption of the foreign law; even though the court finds that the party refusing discovery has deliberately stored documents in the foreign country; and even though the court finds that the party failed to take adequate steps to produce or identify the documents without violating foreign law. *Societe Internationale* and *Westinghouse Electric* do not support such an argument and indeed support the contrary position.[17]

[16] We note that the November 18 order included findings that GAC's failure to produce was caused in part by its "deliberate policy of housing documents in Canada" and that GAC had "not performed or complied with," but rather had "avoided" a prior discovery order. See pp. 8-9 *supra*.

[17] For example, the Court in *Societe Internationale* said that whether a party has "deliberately courted legal impediments to production * * * would have a vital bearing" on the appropriate Rule 37 sanction. 357 U.S. at 209. It previously observed that petitioner had negotiated over a period of two years the release of over 190,000 of the foreign documents in question. *Id.* 203. Clearly the Court considered the overall good faith of petitioner to be an essential consideration. See also, *e.g.*, *Westinghouse Electric*, 563 F.2d at 998.

In any event, the Sanctions Order and Default Judgment was entered *after* the orders by the New Mexico Supreme Court that the petitions request this Court to review. It was not and could not have been passed upon in any way by the New Mexico Supreme Court in issuing those orders.[18] Hence, there is no basis whatsoever for this Court in effect to review that Sanctions Order and Default Judgment on petition for writ of certiorari to the January 11 and March 2 orders of the New Mexico Supreme Court.

GAC's petition in No. 77-1269 principally presents another due process argument which it appears to infer from *Societe Internationale*: that the Due Process Clause requires the trial court to disclose in advance the sanctions that it intended to enter, to permit state appellate review prior to the entry of the sanction. Neither *Societe Internationale* nor *Westinghouse Electric* addressed such a novel contention. No federal or state court of which we are aware follows such an extraordinary procedure, and it seems obvious that it is not mandated by the Constitution. In general the Constitution does not require a state to provide any appellate review, *Ortwein* v. *Schwab*, 410 U.S. 656, 660 (1973), and "an appeal after the entry of judgment" by a trial court undoubtedly is sufficient to comply with the Constitution. *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932). See *Valley Bank of Nevada* v. *Skeen*, 366 F. Supp. 95, 98 (N.D. Tex., 1973),

[18] Indeed, at oral argument before the New Mexico Supreme Court on March 1, 1978, counsel for GAC stated that "[t]he only question before this Court is the validity of the November 18 order which has been reaffirmed twice." Tr. 3/1/78 at 13.

aff'd without opinion, 495 F.2d 1371 (5th Cir., 1974) (default judgment).[19]

2. *Interference with United States Foreign Relations.* The remaining questions presented by GAC may be dealt with briefly. GAC's argument that the November 18, 1977 discovery order unconstitutionally intruded upon United States foreign relations rests essentially on *Zschernig* v. *Miller*, 389 U.S. 429 (1968). That case is very different from this one. There the Court found that, under the

[19] In the paragraph preceding the Conclusion of the petition in No. 77-1269, GAC suggests that "[a]lternatively, in the unusual circumstances of this case, a common-law writ of certiorari, under 28 U.S.C. § 1651, directly to the trial court would be appropriate" to review the March 2 Sanctions Order and Default Judgment. That suggestion should be rejected out of hand. GAC has not even complied with the requirement in Rule 31(1) of this Court that petitions seeking the issuance of an extraordinary writ under 28 U.S.C. § 1651 "shall be prefaced by a motion for leave to file such petition" or with the requirement in Rule 31(2) that a petition for a common-law writ of certiorari "shall set forth with particularity why the relief sought is not available in any other court * * *." GAC could not comply with the latter requirement, as it clearly has a remedy by appeal to the New Mexico appellate courts and thereafter by petition for writ of certiorari under 28 U.S.C. § 1257(3) from the final judgment of the highest state court. Indeed, GAC has presented no argument at all as to why a common-law writ of certiorari is appropriate other than the bare citation of a few decisions by this Court, none of which involved entry of a default judgment or other circumstances at all comparable to those involved here. The only cited case which involved a common-law writ of certiorari, *United States Alkali Export Ass'n* v. *United States*, 325 U.S. 196 (1945), makes clear that the role of the writ is "to confine inferior courts to the exercise of their prescribed jurisdiction or to compel them to exercise their authority when it is their duty to do so," and even then that the writ "may not be used as a substitute for an authorized appeal * * *." 325 U.S. at 202, 203. There is no question about the jurisdiction of the New Mexico District Court to enter a sanctions order and default judgment for violation of discovery orders, as such jurisdiction is expressly conferred by Rule 37 of the New Mexico Rules of Civil Procedure. At most, any issues raised by GAC here or below go to the appropriateness of that court's exercise of its jurisdiction, and if any errors have been committed GAC has the remedy of an appeal.

Oregon inheritance laws and similar laws in other states, probate courts had "launched inquiries into the type of governments that obtain in particular foreign nations," 389 U.S. at 434, leading to "minute inquiries concerning the actual administration of foreign law, [and] into the credibility of foreign diplomatic statements * * *." *Id.* at 435. It found this intrusion into the federal domain too great.

Neither UNC nor I&M sought an adjudication of the legality of any act of the Canadian government, and no such adjudication has been made in this case. UNC has merely sought a fair trial of, and thus discovery relevant to, its claims that GAC and Gulf have conspired with other private uranium producers to fix prices, to monopolize uranium reserves in New Mexico, and to eliminate UNC as a competitor. Evidence of the uranium cartel is also relevant to the issues of fraud, economic coercion, breach of fiduciary duties, and commercial impracticability raised by UNC in its complaint, as well as the antitrust issue. That evidence is further relevant to UNC's defense to GAC's counterclaim, which sought specific performance of its supply contracts with UNC and alleged that UNC had violated the New Mexico antitrust law. In requiring such discovery, and in eventually imposing sanctions for GAC's bad faith evasion of discovery orders, the District Court did not transgress upon the conduct by the United States of its foreign relations. Certainly, neither *Zschernig* nor any other case of which we are aware supports the contrary proposition.

In any event, the November 18 discovery order that GAC attacks in the petition in No. 77-1236 cannot be considered apart from sanctions imposed for violation thereof; yet the only sanctions order outstanding in the case is the March 27 Amended Sanctions Order and Default Judgment, now the basis of a final declaratory judgment. Those later judgments were not passed upon by the New

Mexico Supreme Court in the orders that GAC seeks to have reviewed, and GAC concedes that the recitals and findings in the Sanctions Order and Default Judgment "will first have to be reviewed, upon a careful consideration of the full record, in the New Mexico appellate courts." Pet. No. 77-1269 at 12. *Societe Internationale* upheld a discovery order similar to those issued in this case, and held that good faith on the part of the party refusing discovery requires amelioration of Rule 37 sanctions. Here, however, the trial court has found the "utmost bad faith" in GAC's whole course of conduct in discovery in this case—including that GAC deliberately stored documents in Canada, failed to produce Canadian documents while it was legal to do so, and failed to take adequate steps to identify the documents without violating Canadian law. See pp. 13-15 *supra*.

GAC has cited no case—from this Court or any other—that stands for the proposition that a state court discovery order unconstitutionally interferes with foreign relations or that a sanctions order based on recitals like those found in this case so interferes. Accordingly, there is no reason for consideration of these issues by this Court.

3. *The Act of State Doctrine.* GAC argues that the District Court "totally discounted a criminal law enacted and enforced on Canadian territory by the Canadian government," and is "questioning the legality of an arrangement [the cartel] enforced on Canadian territory" (Pet. No. 77-1236 at 14, 15), all in violation of the act of state doctrine. The argument mischaracterizes the actions of the District Court and misconstrues the act of state doctrine.

The New Mexico courts have not sat "in judgment on the acts of the government" of another country. *Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682, 691 n. 7 (1976); *Underhill* v. *Hernandez*, 168 U.S. 250, 252

(1897). The District Court has simply entered discovery orders, and eventually imposed sanctions for the violation of such orders, in regard to discovery of information relating to a cartel arrangement among private companies. Moreover, the act of state doctrine does not apply to extraterritorial acts of governments, *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), and the cartel operated in the United States, including New Mexico, as well as in other countries.

In any event, GAC's principal concern must be with the findings of fact concerning the cartel, included as sanctions in the Amended Sanctions Order and Default Judgment, which has not yet been reviewed in the state appellate courts. There is no good reason to short-circuit that appellate process.

Moreover, the trial court, rather than disregarding a Canadian criminal law, demonstrated over and over again its concern for the problem posed to a fair trial between UNC and GAC by the Canadian Uranium Security Regulations. The trial court followed the course laid out in *Societe Internationale* and issued a sanctions order only after lengthy findings that GAC had acted in the utmost bad faith throughout the course of discovery. GAC cites not a single decision of any court that supports the proposition that a severe sanction in these circumstances violates the act of state doctrine.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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April 17, 1978.

APPENDICES

APPENDIX A

STATE OF NEW MEXICO
COUNTY OF SANTA FE
IN THE DISTRICT COURT

No. 50827

UNITED NUCLEAR CORPORATION,
Plaintiff,

vs.

GENERAL ATOMIC COMPANY, *et al.*,
Defendants.

AMENDED SANCTIONS ORDER AND DEFAULT JUDGMENT

[Entered March 27, 1978]

This matter coming before the Court upon motions for sanctions and for the granting and entry of default judgments against defendant, General Atomic Company, for its failure to comply with discovery laws and orders of the Court, a motion for an evidentiary hearing upon part of the motions relating to requested sanctions, responses to the aforesaid motions, supporting affidavits and documents, and argument and authorities made and submitted by the various parties; the Court having given due study and consideration to all of the foregoing, and to the whole record and history in this litigation, including all hearings conducted on discovery questions throughout the period from December 31, 1975, to the present; the Court having further reviewed all relevant pleadings, interrogatories and answers thereto, and other relevant and credible documents and materials in this case, as well as pleadings in other related court cases; based upon all of the foregoing, this Court now concludes that the defendant, General

Atomic Company, has followed a conscious, willful and deliberate policy throughout this litigation, which continues to the present time, in cynical disregard and disdain of the Rules of Procedure relating to discovery and this Court's discovery Orders, of concealing rather than in good faith revealing the true facts concerning the international uranium cartel in which Gulf Oil Corporation was involved and which through its subsidiaries, officers, agents and affiliates, including defendant, GAC, participated, from an as yet undetermined time, but for not less than from and during 1972 into 1975; the aforesaid policy of defendant, GAC, of hiding that information from the Court and opposing counsel, and in consequence thereof, the exercise of the utmost bad faith in all stages of the discovery process up to the present time, leads the Court to the inescapable conclusion that at this late date, the Court's discovery Orders will not be complied with by the defendant, GAC, and that this Court is powerless to secure unto all parties to this case either due process of law or a fair trial based upon equality and parity of right and duty unless sanctions under Rule 37 are imposed by the Court at this time. To require the other parties to this case to proceed further upon the trial on the merits at this time, other than upon a consideration of damages, disadvantaged as they are by the lack of discovery and GAC's failure to provide discovery, would result in a grave injustice unto all parties to this action other than GAC and a cynical denial of equal protection of the law unto them; the factual basis for imposing sanctions under Rule 37 appears from and is documented by the "Recitals" which are hereinafter set forth, which manifestly appear from the face of the record herein, without any need or requirement for an evidentiary hearing or other form of additional delay in giving effect to Rule 37, to-wit:

RECITALS

(1) On December 31, 1975, United Nuclear Corporation, plaintiff herein, by motion and leave of the Court, filed its First Set of Interrogatories to General Atomic Company in this action. Those Interrogatories were identical in scope to UNC's interrogatories filed in Cause No. 50044, Santa Fe County District Court. The definition section of those interrogatories filed herein, as well as certain questions, specifically requested information from the constituent partners of GAC, Gulf Oil Corporation and Scallop Nuclear, Inc. Those definitions were not objected to within the time allowed by Rule 33 of the New Mexico Rules of Civil Procedure, and, indeed, were never objected to by GAC.

(2) In UNC's First Set of Interrogatories, UNC asked, *inter alia*, that GAC:

> "32. Identify all agreements and all past, pending or contemplated negotiations of the partnership or the partners, directly or indirectly pertaining to the processing of uranium-bearing ores into U_3O_8 the conversion thereof into UF_6 or any other form, and the marketing and sale of all such uranium-bearing products.
>
> "34. Identify all studies, evaluations, projections and other data pertaining to uranium ore reserves, the mining and milling thereof, the further processing and conversion of uranium and the marketing and sale of all such uranium products."

Such information was relevant and material to the repeated allegations in UNC's Complaint that the 1973 Uranium Supply Agreement and 1974 Uranium Concentrates Agreement were executed in violation of § 49-1-1 and 49-1-2 NMSA 1953 of the New Mexico antitrust statutes.

As to UNC's First Set of Interrogatories, GAC requested and received an extension of time in which to respond.

(3) GAC neither answered nor objected to the Interrogatories within the time allowed, and UNC filed its First Application for Default Judgment on March 10, 1976. On March 12, 1976, the parties entered into an Agreement signed by counsel for UNC, GAC and Gulf Oil Corporation in which UNC agreed to withdraw its Application for Default Judgment, and GAC agreed to "answer in good faith all interrogatories to Defendant presently pending in this action," and to produce documents. No objection was made to the fact that information concerning Gulf Oil Corporation was requested, or that Gulf Oil Corporation was obligated by the terms of this Agreement to produce relevant documents. The agreement between the parties expressly referred to "Gulf Correspondence" as one category of documents which GAC agreed to provide. Said Agreement was entered into with Gulf Oil's knowledge and approval, its attorney having executed same.

(4) The documents generated by the cartel's Secretariat, telexes by the Secretariat, documents of the Canadian producers' group, as well as internal Gulf documents concerning the cartel were, at the time of the March 12, 1976 Agreement, subject to UNC's Interrogatories and the Agreement to produce. At that time, most or all of these documents were in the files and custody of Gulf Minerals Canada, Limited, a wholly owned subsidiary of Gulf Oil Corporation, and included within the scope of UNC's First Interrogatories, in Canada, and no law of the United States or Canada prohibited their production.

(5) Rather than answering the Interrogatories fully, or producing the Gulf cartel documents which was within the ambit and requirement to furnish of its March 12, 1976 Agreement, GAC instead filed on April 2, 1976

wholly inadequate and evasive answers to the Interrogatories. In response to UNC's interrogatory No. 69 (first set) which asked GAC when the business records of Gulf and Scallop would be produced for inspection and copying, GAC, under oath answered that it would produce those records for inspection and copying on June 20, 1976.

(6) In response to GAC's Motion to Stay Further Proceedings, this Court held on April 30, 1976, that the "parties are bound by their agreements," and that GAC was obligated to provide full discovery as contemplated by the March 12, 1976 Agreement.

(7) From March 12, 1976, forward, GAC neither identified nor produced cartel documents or information in the possession of Gulf Oil Corporation and its subsidiaries, despite its Agreement to do so, and the Order of the Court on April 30, 1976, that it comply with that Agreement.

(8) On August 6, 1976, UNC filed its Second Motion for Default Judgment for GAC's failure to answer UNC's Interrogatories propounded on December 31, 1975, and its failure to abide by the March 12, 1976 Agreement and the Court's April 30, 1976 Order. In response to that Motion, GAC represented to the Court that "complete and full effort has been made to cooperate with the demands of Plaintiffs in document discovery and such attempts have gone fully beyond any good faith requirements by the Rules of Civil Procedure or agreement of the parties."

(9) From December 31, 1975, the date UNC's Interrogatories were filed in this case, through September 23, 1976, the date the Canadian government passed the Uranium Security Regulations, GAC never informed this Court or UNC about the existence of the international uranium cartel; Gulf Oil Corporation's participation therein; or about the Gulf documents relating thereto in Canada.

(10) Despite its agreement and this Court's Order to produce Gulf documents, GAC willfully, intentionally and in bad faith covered up the fact of Gulf Oil Corporation's participation in an international uranium cartel from at least 1972 into 1975, which include years in which it was in a joint venture with UNC, viz., Gulf United Fuels Corporation (GUNF). GAC thereby deliberately concealed the existence of evidence which it knew to be highly relevant to the antitrust issues pleaded in UNC's Complaint and stressed by counsel throughout the discovery period. This intentional and willful action was a violation of UNC's discovery rights and the Orders of this Court.

(11) The Court repeatedly has warned that all parties are obligated to make full disclosure in good faith to discovery requests. On several occasions since the beginning of litigation, the Court has told all parties that it expected a good faith, non-evasive and full compliance with discovery. The Court also warned on November 30, 1976, and again on March 3, 1977, that it would apply sanctions provided under Rule 37 of the New Mexico Rules of Civil Procedure for *any party's failure to make discovery in good faith.*

(12) UNC's Second Set of Interrogatories, the discovery subject matter of which also was clearly within the ambit and requirement of its First Set of Interrogatories filed on December 31, 1975, were served on August 16, 1977. A good faith, non-evasive response by GAC to said First Set of Interrogatories would have, in whole or in part, eliminated the necessity for the Second Set of Interrogatories. The Second Set of Interrogatories requested full disclosure and commitment to a set of specific facts by GAC concerning its and Gulf's cartel activities, and requested identification of all documents relevant to each interrogatory.

(13) UNC also filed a Motion to Produce all documents identified in GAC's Answers to Interrogatories on August 16, 1977.

(14) GAC objected to UNC's Second Interrogatories on August 23, 1977, most of which objections were overruled. On September 9, 1977, this Court held a hearing on additional objections by GAC to UNC's Second Set of Interrogatories, most of which were also overruled. GAC was ordered to answer by September 20, 1977. In a hearing before the Court on September 20, 1977, counsel for GAC requested an extension of time in which to answer said Interrogatories on the ground that the extension would enable counsel to provide "full and good faith" answers to the Interrogatories. The extension was granted, and on September 26, 1977, GAC filed its first Answers to UNC's Second Set of Interrogatories.

(15) GAC's first Answers consisted in a large measure of a "do-it-yourself" kit, merely directing UNC to deposition pages from which it was supposed to discover the answers to its interrogatories. This Court, on October 11, 1977, held that GAC's Answers were "defective, incomplete, inadequate and unacceptable." GAC was again ordered to answer the Interrogatories, and to give full and good faith discovery.

(16) On October 20, 1977, GAC filed its Second Answers to UNC's Interrogatories. Those "Answers" excluded all information contained in the Gulf documents in Canada, and did not identify the documents as GAC had been ordered to do on October 11, 1977.

(17) On December 9, 1977, Indiana and Michigan, Detroit Edison and UNC joined in moving to compel further answers to UNC's Second Set of Interrogatories.

(18) After consideration of all briefs filed by GAC and others, this Court held that the answers made and filed by GAC to date had not complied with the Court's

orders to make complete, good faith, and non-evasive answers to UNC's Second Set of Interrogatories. The Court therefore again ordered GAC "completely, in good faith, and without evasion" to answer each of the interrogatories enumerated in Finding No. 3 of the Court's December 27, 1977, Order. The Court also specifically gave notice in its December 27, 1977, Order that if GAC failed or refused to comply with that Order of the Court, any aggrieved party could apply to the Court for appropriate relief under Rule 37.

(19) GAC obtained from the Court two extensions of time in which to answer UNC's Interrogatories, and filed its Second Supplemental Answers on February 1, 1978. The Court has examined the answers so filed and finds them unresponsive and evasive to the questions asked, and mere legal argument in many of such answers. The series of Interrogatory Answers filed by GAC, after six months shows disdain for this Court's Orders that all parties make good faith discovery. Those answers so filed, coupled with what had gone before them, constitute, in effect, obstruction of justice, and demonstrate a willful deliberate and flagrant scheme of delay, resistance, obfuscation and evasion in discovery matters.

(20) The latest answers filed by GAC also violate the express terms of the Court's Order of October 11, 1977, wherein the Court held that the deposing party is entitled to obtain from the deponent party a commitment to a set of facts, posture or position on the subject matter of the Interrogatory. Rather than committing to a set of facts, GAC instead simply has stated that various cartel documents cited by I & M, which GAC had failed to mention in its Second Answers, "purport to" reflect certain events. GAC steadfastly has refused and refuses to admit that such events took place, or to state the true facts concerning the cartel, and Gulf's participation in it.

(21) By reason of the entire history relating to the manner of fulfilling its discovery requirements since the filing of UNC's First Set of Interrogatories on December 31, 1975, the Court concludes that it is hopeless to expect that GAC will in "good faith and without evasion" comply with the discovery requirements of the New Mexico Rules of Civil Procedure or this Court's Orders. GAC has willfully, intentionally, deliberately and in bad faith, failed and refused to answer UNC's Second Set of Interrogatories. UNC and the other parties to this suit have been irreparably prejudiced by this failure. Any party to any civil action is entitled to have and rely upon good faith discovery in the preparation and presentation of its case in chief and not at the end of the trial on its merits when such discovery is of little or no value to such party. If there can be any sanctions for non-discovery and if Rule 37 has any meaning, a party unlawfully deprived of discovery is entitled to those sanctions early and as a part of its case in chief and not at the end of the trial on its merits, whereby the innocent victim party would suffer the jeopardy of a motion for dismissal under Rule 41 (or for a directed verdict) without having the discovery to or sanctions to counter such a motion. It is now too late to expect answers or discovery in time to serve the purposes of the discovery rules and the Rules of Civil Procedure. This Court, in the interests of justice and fairness to all parties, and in order to enforce equality within the judicial process, must, at this time, apply appropriate sanctions for non-discovery specifically provided for in Rule 37 of the New Mexico Rules of Civil Procedure.

(22) GAC is under a duty to produce all documents to UNC which are or may be relevant to any of the Interrogatories asked in UNC's First Set of Interrogatories and even more particularly delineated and asked in UNC's Second Set of Interrogatories, including but not

limited to any documents relevant under questions 30 through 34 of the First Set of Interrogatories.

(23) GAC has represented to the Court and to all parties on several occasions that UNC had all documents which were relevant to the cartel or other issues raised in UNC's Interrogatories.

(23-A) GAC, as well as all parties to this action has been under a continuing obligation to update answers to interrogatories and to continue to produce documents in this litigation as their existence became known. In early January, 1978, GAC produced additional cartel documents to the U.S. Grand Jury in Washington, D.C. and to Westinghouse Electric Corporation. GAC, in bad faith, failed to reveal the existence of these documents to this Court or to the parties to this case, until after UNC had learned of their existence from a third party and made a demand upon GAC.

(24) The facts hereinabove set forth display a pattern and practice of GAC and Gulf to conceal documentary evidence of Gulf's and GAC's anti-trust activities and to subvert the discovery processes of this Court. GAC has deliberately failed to produce highly relevant documentary evidence. GAC has deliberately failed to inform this Court and the other parties, in a reasonably timely manner, of actions taken by another court in another jurisdiction which had a direct bearing upon the existence and materiality of such evidence. On August 10, 1977, Judge Snyder entered an order de-privileging, making public and holding outside the scope of the attorney-client privilege, approximately 41 of the 84 documents turned over to him by Gulf Oil Corporation for inspection in the Federal District Court in Pittsburgh, Pennsylvania. Despite the fact that the same law firm which represents GAC in this action represented Gulf before Judge Snyder in the Federal case in Pittsburgh, this

matter inexplicably was not brought to this Court's attention promptly by GAC. GAC never accurately disclosed to the Court nor to UNC the existence of all 84 of the documents turned over by Gulf to Judge Snyder in the Westinghouse litigation. The existence of most of those documents was not disclosed to the Court or to UNC until over one year after they were called for by UNC's First Set of Interrogatories and the agreement of the parties on March 12, 1976. The existence of some of the Snyder documents was not disclosed by the Court or to UNC until after Judge Snyder held them to be public and outside the scope of the attorney-client privilege. It was not until after UNC brought the matter of the Snyder order up in open court on October 7, 1977 and this Court's subsequent order that GAC first identified and turned over to UNC some of the Snyder documents. The failure to reveal the existence and identity of all of the Snyder documents in a timely manner in this case, was a deliberate attempt to further conceal the existence and identity of that evidence and avoid turning relevant documents over to parties to this litigation in compliance with lawful discovery demands.

Based on all facts, the Court is forced to conclude, therefore, that GAC has followed a consistent pattern and practice of concealing, rather than revealing, highly relevant documents to the Court and to the parties here, and that such actions and practices have been contumacious, intentional, willful, deliberate and, in the utmost bad faith.

(25) Within the ambit and requirement of its First Set of Interrogatories, filed on December 31, 1975, UNC's Second Set of Interrogatories with even more particularity and specificity ask, in almost every question, for the separate identification of documents relating to the subject matter of each separate interrogatory, and production of all documents so identified. In GAC's First

Answers to such Second Set of Interrogatories, filed on September 26, 1977, no identification of documents was made and virtually no documents were produced, despite UNC's clear request for such identification and production.

(26) In its October 11, 1977, Order, the Court required and ordered GAC to "separately, clearly and definitively identify all documents, where such identification is requested, whether such documents be housed only in Canada, only in the United States, in both countries or elsewhere."

(27) Rather than identifying the documents, GAC instead wrote a Canadian Minister asking if it could get permission to reveal "a summary of contents" of the documents. As this Court held on November 18, 1977, the Court's October 11, 1977, Order did not specify that a "summary of contents" be stated as part of the identification of documents. The Court's Order of October 11, 1977, to identify documents was not performed or complied with, but, rather, it was sought to be avoided, and willfully and deliberately violated by GAC.

(28) GAC next wrote a letter to a Canadian Minister who has been determined by the courts of Canada to have no authority to interpret or deal with the Uranium Security Regulations. Nevertheless, in full knowledge that the Minister to whom it wrote had no legal authority to interpret the Regulations, GAC asked and waited for his interpretation as to whether he thought it could identify documents in accordance with the Court's October 11 and November 18, 1977, Orders. A letter was received from the Canadian Minister saying he had no authority to interpret the Regulations, but that in his personal opinion, the Regulations did not allow identification.

(29) The Canadian Security Regulations on their face prohibit only revealing "contents or information contained

in" cartel documents in Canada. A reasonable interpretation of that language, and this Court so reads it, would mean that simple identification, giving the date of the document, the author, addresses, and general subject matter, would not violate the law of Canada because the "contents or information" contained in the document itself would not be revealed.

(30) Nevertheless, GAC has refused to comply with the Order of this Court also concerning identification of the Canadian documents. As of this date, GAC has not identified the documents in Canada for the benefit of the Court and the parties nor has it even stated or disclosed the number of documents housed in Canada, thereby following its established practice of concealing, rather than revealing, pertinent information.

(31) The Court's October 11, 1977, Order also required GAC to "take affirmative action and to exert all lawful effort reasonable and possible to bring about the production" of documents housed in Canada. In order to be held to have been acting in good faith, the Court said that GAC should "seek diligently dispensation from those Canadian laws so that it could lawfully produce documents to which such laws may pertain."

(32) GAC's response to this requirement that it take "all lawful effort reasonable and possible" (other than so late as February 22, 1978, to offer to take other counsel and the Court to Canada to talk to Canadian officials about production of documents, in person), was to write a simple letter to the Canadian Minister of Energy, Mines and Resources, asking if he would consent to release the documents in question. The Canadian government's answer was "no.".

(33) Actions taken by parties in similar cases in dealing with foreign governments which have imposed secrecy laws are instructive as to the standard of "good

faith" to be used in dealing with foreign governments to secure the release of documents. In *In Re Ampicillin Litigation*, in which Judge Sirica ordered that findings of fact be made against a party which refused to produce documents and because of a British secrecy law, the Defendant undertook diligent and long-term negotiations with the British government which ultimately resulted in the documents being released in their entirety.

(34) Similarly, in *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958), "good faith" in dealing with a foreign government over the release of documents was found only after the petitioner had negotiated for two years with the Swiss government, which resulted in the release of over 190,000 documents. In addition, petitioner there persuaded the Swiss government to allow a neutral third party agreed upon by petitioner and the Swiss government to inspect the documents and obtain the release of some of them.

(35) GAC's writing a simple letter to a Canadian Minister who has been declared by law to have no authority to interpret Canadian Security Regulations or to grant a dispensation therefrom does not constitute a "good faith" effort to secure the release of documents in Canada or the information contained in them. Neither GAC, nor Gulf Minerals Canada, Ltd., nor Gulf Oil Corporation has entered into any negotiations with the Canadian government, or taken any further action beyond writing a simple letter insofar as made known to this Court. Such action does not constitute the "good faith" and "diligent" effort to secure the release of the documents required by the Court's October 11, 1977, Order. In fact, GAC's actions demonstrate its actual intent to conceal the documentary evidence concerning the cartel rather than to produce it in good faith to the parties to this litigation and the Court.

(36) UNC filed a Motion on November 4, 1977, asking that this Court find all facts provable from the documents stored in Canada against GAC. The Court authorized the presentation of evidence at an evidentiary hearing.

(37) At the aforesaid evidentiary hearing, GAC put on evidence through an attorney with Howrey and Simon, who testified about the efforts made by that law firm to identify documents in answer to UNC's Interrogatories. GAC put on absolutely no evidence about how the documents came to be stored in Canada, or why they were there.

(38) UNC moved the admission at the evidentiary hearing of four separate statements by M. L. T. Gregg in his *Westinghouse (Richmond)* deposition. The admissibility of this deposition testimony was stipulated to by counsel for GAC on the record.

(39) Mr. Gregg's deposition testimony established that Gulf followed a deliberate policy of housing the cartel documents in Canada, rather than in the United States. His testimony also established that to the extent documents were in the United States, it was understood that they were to be stored in the offices of the Pittsburg law department, where they could be shielded by a claim of attorney-client privilege.

(40) It was on this uncontradicted factual record that the Court made its findings on November 18, 1977, that Gulf followed a conscious and deliberate policy of housing the cartel documents in Canada. That finding is reiterated here. Gulf's action in regard to storing cartel documents in Canada amounts to deliberately courting or seeking legal impediments to the production of the records.

(41) UNC has complied with GAC's discovery requests fully and in good faith insofar as anything in that regard

has been brought to the attention of or is known to the Court. No representation to the contrary has been made by any party hereto.

(42) All other parties to this litigation except GAC have also made good faith efforts at discovery, and have both produced documents and answered interrogatories in good faith.

(43) Based on the deposition testimony given by L. T. Gregg in this case, it is apparent that there are documents which presently exist in the files of Gulf Minerals Canada, Ltd. (a wholly owned subsidiary of Gulf) which are highly relevant to the antitrust, fraud and breach of fiduciary duty allegations by UNC in its Complaint and in its defense to GAC's Counterclaim. GAC has produced to the parties to this litigation only a small part of those documents. GAC's refusal to produce documents housed in Canada since December 31, 1975, was not based on inability to comply with production requests, but rather on bad faith refusal to produce.

(44) The cartel documents and records were clearly within the ambit and requirement of a good faith compliance with the initial discovery demands made herein by UNC in its First Set of Interrogatories on December 31, 1975, and numerous subsequent demands made prior to September 23, 1976, the effective date of the Canadian Uranium Information Security Regulations.

(45) Defendant, GAC, was in default and violation of its obligation to produce cartel documents from Canada and elsewhere in this case, prior to and long before September 23, 1976, wherein and whereby a good faith compliance with lawful discovery demands, their agreements and the Orders of this Court, would have produced in this case all of such cartel documents before there was a Canadian law or prohibition against so doing.

(46) The findings and recitals in the Court's Order of November 18, 1977, relating to discovery are adopted and incorporated herein by reference as a part of the "Recitals" of this Order. A copy of said Order of November 18, 1977, is hereunto attached.

(47) In this situation, GAC's failure to produce in good faith and failure to answer interrogatories in good faith has deprived UNC of a full and fair opportunity to cross-examine GAC's witnesses to defend against GAC's counterclaims for specific performance and damages; to rebut GAC's defenses to their claims; or on its case in chief to properly present United Nuclear's antitrust claims pleaded in the Complaint. Similarly, GAC's failure in discovery has deprived this Court of evidence which is indispensable to a proper and just adjudication of the issues in this case.

(48) The Court concludes that the only just and proper way to protect and secure due process rights to a fair trial for UNC, and the defendant, I & M is to impose sanctions under Rule 37 of the New Mexico Rules of Civil Procedure.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

A. The Court hereby adopts and imposes the following Rule 37 sanctions against the defendant, GAC, and in favor of the other parties to this case, adopted and found as fact because of the failure of defendant, GAC to comply with discovery Rules and the Orders of this Court, which failure the Court finds to be willful and deliberate, to-wit:

1. Gulf Oil Corporation (Gulf), Gulf General Atomic (GGA), Gulf Minerals Canada, Ltd. (GMCL), General Atomic Company (GAC), and Gulf Minerals Resources Company (GMRC), severally and as co-conspirators with

each other, and with other members and participants therein, participated in the formation and operation of an international conspiracy and cartel of uranium producers ("the cartel"), from at least 1972 to 1975. The purpose and effect of the cartel was to limit the supply, control production, allocate markets and fix the price of uranium.

2. The Canadian Government encouraged, but in no way required or mandated the membership of GMCL in the cartel. Neither Gulf, GGA, GMCL, GAC, nor GMRC, nor any of them, was ever compelled by the Canadian Government to participate in the cartel. GMCL would not have had the authority to join and participate in the cartel without authorization from responsible officers of Gulf, who were members of the so called "Executive", and who gave such authorization and sanction to the participation, actions and dealings of GMCL in the cartel.

3. GMCL is and was a wholly owned subsidiary of Gulf, and after GMCL joined the cartel, its members and members of the cartel Operating Committee had a number of meetings at various locales around the globe. At such meetings, the members of the cartel, including GMCL, agreed: (a) not to sell to middlemen, wherever located, or, alternatively, to do so only on highly discriminatory terms. Such middlemen included and were understood by both GMCL and Gulf to include both Westinghouse and Gulf United Nuclear Fuels Corporation (GUNF), and (b) to divide world markets (including the USA) and to fix the price of uranium. GUNF at all times was a corporation wholly owned by Gulf and UNC as a joint venture between them, and with Gulf holding majority ownership and management control thereof.

UNC and Gulf were under a fiduciary relationship, one to the other in their aforesaid joint venture creation, ownership and operation of GUNF. As fiduciaries, such owed to the other full disclosure of any information affecting or that might affect the operation and success of GUNF.

4. Said cartel agreements were carried out effectively; the world market price of uranium was fixed at artificially high levels by the cartel, and GUNF, a middleman, was greatly handicapped and damaged in its efforts to procure uranium.

5. Pursuant to an agreement with the cartel, Gulf, individually and with and through its divisions, affiliates and subsidiaries, including but not limited to GMCL, restricted and withheld production of uranium at Mount Taylor in New Mexico in order to limit the supply and control production of uranium in New Mexico, with the independent specific intent to monopolize New Mexico uranium reserves. The restriction of Mount Taylor production was and is a part and parcel of the aforesaid conspiracy by Gulf and by the cartel. Such restriction of production was a combination and attempt to monopolize as well as actual monopolization of New Mexico uranium reserves, and has constituted and constitutes a substantial adverse effect on New Mexico commerce.

6. Gulf and GAC executed the 1973 Uranium Supply Agreement and the 1974 Uranium Concentrates Agreement with United Nuclear Corporation (UNC) with the intent and as a part of an attempt, combination and conspiracy, engaged in by Gulf, GAC, their affiliates, divisions and subsidiaries, to monopolize New Mexico uranium reserves, and with the purpose and effect, in furtherance of the cartel conspiracy, to limit supply and control production and competition with the cartel from a New Mexico uranium producer. Both of the aforesaid contracts had and have as their object by Gulf and GAC, and do in fact operate, to restrict trade or commerce of a product of the mines of New Mexico, and have constituted and constitute a substantial adverse effect on New Mexico commerce.

7. Gulf and GAC executed the aforesaid agreements as a part of the attempt, combination and conspiracy engaged in by them, their affiliates and subsidiaries and the cartel to monopolize and the actual monopolization of New Mexico uranium reserves.

8. Gulf and GAC knew and intended that the cartel and its actions would and did in fact substantially raise the price of uranium in the United States of America domestic market, which did substantially and adversely affect New Mexico commerce.

9. Pursuant to a policy of secrecy and the cartel's directions, rules or requirements concerning secrecy, neither did Gulf, nor GAC, nor anyone acting for them, ever inform UNC or GUNF about their aforesaid participation in or the actions of the cartel, at anytime before the execution of or negotiations concerning the aforesaid 1973 and 1974 agreements. Gulf and GAC thereby breached any fiduciary duty it may have owed in the premises to UNC or to GUNF, or to both.

10. Pursuant to the cartel's express inclusion of the United States market and United States buyers in its price fixing scheme, Gulf, GMCL and GGA quoted uranium to United States utilities at cartel prices, and to GUNF at prices above cartel prices, with specific and predatory intent of injuring GUNF and UNC, thereby breaching any fiduciary duty in the premises owed to UNC and committing a predatory act against GUNF.

11. Motivated by inside knowledge of the cartel's existence, policies and actions and its plan to keep UNC's uranium locked up and out of competition with the cartel, Gulf refused to supply uranium to GUNF as it had led UNC and GUNF to believe it would do and refused to allow GUNF to purchase uranium on the open market, thereby breaching any fiduciary duty it may have owed to UNC.

12. The cartel viewed middlemen as serious competitors, and discriminated in price against them in order to eliminate them as competitors. Gulf Oil Corporation and General Atomic Company executed the 1973 and 1974 Uranium Supply Agreements with the purpose and effect of eliminating middlemen as competitors by keeping material off the market which they might purchase.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED:

A. Judgment by default, except upon the issues of damages, be and it hereby is entered and granted:

1. Unto United Nuclear Corporation upon its Complaint against General Atomic Company, and

2. Unto Indiana & Michigan Electric Company upon its Crossclaim against General Atomic Company.

B. The defenses of General Atomic Company to the Complaint of United Nuclear Corporation and to the Crossclaim of Indiana & Michigan Electric Company and its Counterclaim against United Nuclear Corporation and its Crossclaim against Indiana & Michigan Electric Company, be and they all hereby are stricken.

IT IS FURTHER ORDERED that the trial of this case on its merits continue and proceed upon determination of damages only, and such other matters as may now be appropriate in view of the granting of default judgments herein.

IT IS FURTHER ORDERED that the Court shall and hereby does reserve the prerogative to make and enter herein such other, further, additional or different findings, orders or judgments, and to do such acts and conduct such proceedings as may be necessary to give full effect

to the foregoing Sanctions Order and Default Judgments and to enforce justice between the parties hereto.

/s/ Edwin L. Felter
EDWIN L. FELTER
District Judge

APPENDIX B

STATE OF NEW MEXICO
COUNTY OF SANTA FE
IN THE DISTRICT COURT

No. 50827

UNITED NUCLEAR CORPORATION,
Plaintiff,

vs.

GENERAL ATOMIC COMPANY, *et al.*,
Defendants.

ORDER

[Entered March 27, 1978]

This matter coming before the Court upon the Motion of the defendant, General Atomic Company, For Reconsideration, Clarification, Certification For Appeal and Stay, supplements to said motion and responses thereto, supporting affidavits and documents and memoranda of argument and authorities; the Court being fully advised in the premises, Finds:

1. Insofar as there are errors, omissions or inaccuracies in the Court's Sanctions Order and Default Judgment entered on March 2, 1978, those errors, omissions and inaccuracies, in the view of this Court, have been corrected by an Amended Sanctions Order and Default Judgment filed and entered simultaneously with this order.

2. Except to the extent that said Amended Sanctions Order and Default Judgment amends or modifies the original Sanctions Order and Default Judgment entered on March 2, 1978, and except for the possibility of entry

of rule 54(b) judgments on the issues of liability, the Court finds that the motion of the defendant, General Atomic Company, as supplemented, For Reconsideration, Clarification, Certification for Appeal and Stay is without merit and should be denied.

3. The Motion of defendant, General Atomic Company, For Leave to File Reply to UNC's and I & M's Responses to GAC's Motion for Reconsideration, Clarification, Certification for Appeal and Stay is without merit and should be denied.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

A. Except to the extent that the Court's Amended Sanctions Order and Default Judgment, entered herein, modifies and amends the original Sanctions Order and Default Judgment, entered on March 2, 1978, and except for the possibility of entry of rule 54(b) judgments on the issues of liability, the motion of defendant, General Atomic Company, For Reconsideration, Clarification, Certification for Appeal and Stay, as supplemented, is denied.

B. The Motion of defendant, General Atomic Company, For Leave to File Reply to UNC's and I & M's Responses to GAC's Motion For Reconsideration, Clarification, Certification for Appeal and Stay is denied.

C. The Sanctions Order and Default Judgment entered herein on March 2, 1978, as amended and modified by the Amended Sanctions Order and Default Judgment, shall be and remain of full force and virtue.

/s/ Edwin L. Felter
EDWIN L. FELTER
District Judge

APPENDIX C

STATE OF NEW MEXICO
COUNTY OF SANTA FE
IN THE DISTRICT COURT

No. 50827

UNITED NUCLEAR CORPORATION, a Delaware corporation,
Plaintiff,

vs.

GENERAL ATOMIC COMPANY, *et al.*,
Defendants.

DECLARATORY JUDGMENT AS TO ISSUES BETWEEN UNITED NUCLEAR CORPORATION AND GENERAL ATOMIC COMPANY

[Entered April 4, 1978]

This matter having come before the Court for the entry of its final declaratory judgment pursuant to the provisions of the Declaratory Judgment Act.

And it appearing to the Court that on March 2, 1978 the Court made and entered a Sanctions Order and Default Judgment by which, for the reasons therein stated, separate and independent sanctions consisting of Findings of Fact, a Default Judgment and the striking of its Answer and Counterclaim, were imposed upon General Atomic Company and in favor of United Nuclear Corporation pursuant to Rule 37 of the New Mexico Rules of Civil Procedure. Said Sanctions Order and Default Judgment thereafter was modified in certain respects and as so modified should be, and hereby is approved and confirmed and the case is ripe for the entry of judgment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AND IT IS THE DECLARATORY JUDGMENT OF THE COURT THAT:

A. The 1973 Uranium Supply Agreement executed on September 12, 1973, as of June 10, 1973 between United Nuclear Corporation, Gulf Oil Corporation and Gulf United Nuclear Fuels Corporation is null, void, unenforceable and of no effect whatever and performance thereunder is excused.

B. The Uranium Concentrates Agreement between United Nuclear Corporation and General Atomic Company dated June 28, 1974, is null, void, unenforceable and of no effect whatever and performance thereunder is excused.

C. General Atomic Company is obligated to idemnify and save United Nuclear Corporation harmless from any and all claims, causes of action, liabilities, obligations, damages, costs and expenses arising out of, or in any way connected with or relating to the latter's failure to deliver or perform under the aforesaid 1973 Uranium Supply Agreement or any other contract with an electric utility company covered by or related to said agreement.

D. General Atomic Company's defenses to United Nuclear Corporation's First Amended Complaint, as set forth in its Answer and in the Pre-trial Order, should be, and they hereby are, stricken and held for naught.

E. General Atomic Company's Counterclaim against United Nuclear Corporation and each and every count thereof, as stated in said Counterclaim and in the Pre-trial Order should be, and is hereby, stricken and held for naught.

F. United Nuclear Corporation has no obligation to General Atomic Company or its predecessors in interest in respect to the sale or delivery of uranium in any form.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court having decided to make formal disposition of the remaining damage issues at a later time, nevertheless determines as contemplated by Rule 54(b)(1) of the New Mexico Rules of Civil Procedure that there is no just reason for delay in the entry of this final judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff, United Nuclear Corporation, recover its costs herein to be taxed by the Clerk in the manner prescribed by law.

/s/ Edwin L. Felter
EDWIN L. FELTER
District Judge

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-1236 and 77-1269

GENERAL ATOMIC COMPANY,
Petitioner,

v.

EDWIN L. FELTER, ETC., ET AL.,
Respondents.

On Petitions for Writs of Certiorari to the Supreme Court of New Mexico

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SUPPLEMENTAL BRIEF FOR RESPONDENT UNITED NUCLEAR CORPORATION IN OPPOSITION

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SUPPLEMENTAL BRIEF FOR RESPONDENT UNITED NUCLEAR CORPORATION IN OPPOSITION

Pursuant to Supreme Court Rule 24(5), respondent United Nuclear Corporation ("UNC") files this supplemental brief in response to the brief of the Government of Canada as *amicus curiae* in support of petitioner, which was filed in this Court at the same time as the respondents' briefs in opposition. With all due respect to the Government of Canada, its brief does not provide any basis for this Court to grant the petitions for writs of certiorari.

1. Nothing in the *amicus* brief detracts from or affects the demonstration on pages 18-21 of the our brief in opposition that the decisions of the New Mexico Supreme Court denying petitions for extraordinary writs rest on independent and adequate state grounds.

2. The *amicus* brief does not support the constitutional, act of state, or foreign relations arguments made by GAC. Indeed, the brief states (p. 2, n.1) that the "Government of Canada takes no position on the merits of the case."

3. The *amicus* arguments are based upon the contention (p. 6) that "the New Mexico courts have violated well-established principles of international comity, which are recognized by United States law." That argument was not presented in those terms to the New Mexico Supreme Court and thus is not properly before this Court. Supreme Court Rule 23(1)(f). In any event, this Court pointed out in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 423 (1964), that while "United States courts apply international law as a part of our own in appropriate circumstances * * *, the public law of nations can hardly dictate to a country which is in theory wronged how to treat that wrong within its domestic borders."

4. The authorities from the Second Circuit relied upon by *amicus* (p. 7) do not show that the District Court in this case violated any principle of international comity or constitutional law in issuing the November 18 order that was the subject of GAC's attempts to persuade the New Mexico Supreme Court to issue an extraordinary writ.

In *Application of Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962), the most recent of those authorities, the Court of Appeals affirmed a district court ruling that Chase had sufficiently shown that production of the rec-

ords requested by a grand jury subpoena *duces tecum* would violate Panamanian law. It is significant to note, however, that the district court left the subpoena outstanding "to insure that Chase complied with its 'duty of actively cooperating with the Government'" in persuading the Panamanian authorities to authorize production, and the Court of Appeals noted that Chase "will still be required to demonstrate its good faith, since the [trial] court left the subpoena outstanding." 297 F.2d at 613.

Hence that case supports the entry of the November 18, 1977 discovery order and the necessity of a good faith effort to comply, and the finding below that GAC did not make a good faith effort to comply with its discovery obligations is not attacked here. Neither the *Chase Manhattan* case nor any of the others cited by *amicus* [1] holds that a state court is constitutionally prohibited from following the procedure set forth in *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958), and entering a discovery order as a predicate for whatever sanctions may be

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[1] In *Federal Maritime Commission* v. *De Smedt*, 268 F. Supp. 972 (S.D.N.Y. 1967), the case was before the district court on a motion by the FMC for an order adjudging respondents in contempt for failure to produce documents in violation of foreign law. It thus concerned a sanctions order, not simply a discovery order.

In *First National City Bank of New York* v. *Internal Revenue Service*, 271 F.2d 616 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960), the Court of Appeals reversed a district court order relieving a party from the obligation to comply with a subpoena *duces tecum* that required the production of foreign documents. It directed the district court "to explore in contempt proceedings * * * the ability of the Bank to comply without subjecting its personnel to criminal sanctions under Panamanian law." 271 F.2d at 620.

Although *Ings* v. *Ferguson*, 282 F.2d 149 (2d Cir. 1960), speaks of international comity in the passage quoted (Canada Br. at 7), the case concerned a subpoena *duces tecum* directed to a nonparty, and the court was principally concerned that other available means to secure the documents without the issuance of a subpoena (*i.e.*, letters rogatory) first be exhausted.

appropriate.[2] A court may elect to quash a production order because of the demonstrated impossibility of complying with the order without violation of foreign law, but such election is not constitutionally compelled.

5. The Canadian Information Security Regulations forbid any "person who has in his possession or under his control" certain "written or printed material" to "release any such note, document or material, or disclose or communicate the contents thereof * * *." (Pet. No. 77-1269 App. 86a.) Those regulations do not in terms prohibit the identification of such material. The *amicus* brief admits that a discovery order—as opposed to a sanctions order—is appropriate "in order to facilitate a clarification of foreign law" (Br. 7, n.12), but states that the letter from the Canadian Minister dated October 19, 1977 (Pet. No. 77-1236 App. 37a) made clear that Canadian law prohibited production or identification of documents housed in Canada (Br. 7, n.12). In fact, the October 19 letter did far less. It responded to a letter from counsel for GAC that stated that the required identification would include a "[s]ummary of contents" (Pet. No. 77-1236 App. 34a, 36a). The Canadian Minister said only that compliance with the District Court's orders, "*in the manner described in your letter*, would be a violation of the Regulations." *Id.* App. 38a (emphasis added).

In its November 18 order, the District Court observed that its prior order requiring identification of documents had *not* specified a "summary of contents." See *id.* App. 3a. For this reason, the court found that, when GAC advised the Canadian Minister that a summary of contents would be required, the provisions of its prior order "were not performed or complied with but rather

[2] The discovery orders at issue in the instant case are much more limited than those in any case cited by *amicus*. The District Court required *production* of documents housed in Canada only "[i]nsofar as it is lawful to do so." See UNC Br. Opp. 7-9.

they were sought to be avoided." *Id.* Accordingly, as of November 18, the District Court had good reason to doubt GAC's assurances that mere identification of the documents in question would violate Canadian law, and the order was appropriate for the very reasons, among others, that the *amicus* brief acknowledges as valid—to insure that good faith efforts were made to negotiate the identification of the documents or to obtain a clarification of foreign law.

In fact, the diplomatic note transmitted to this Court by the Solicitor General on March 16, 1978, indicates that identification of the documents is not flatly prohibited under the Canadian Regulations. The note states on page 3 that:

> "The interpretation of the Regulations, including a determination of their scope, is a matter for Canadian courts. However, in the application of these Regulations, the Government of Canada has proceeded on the understanding that any *identification* of documents covered by the Regulations *which involved drawing upon the information in the documents is prohibited by the Regulations.*" (Emphasis added.)

GAC neither identified any of the documents located in Canada without "drawing upon the information in the documents" nor sought a determination by the Canadian courts concerning the extent to which it might produce or identify the documents so as to comply as fully as possible with the orders of the New Mexico District Court. See p. 4, n.4, of the *amicus* brief, and Recitals 31-35, UNC Br. Opp. App. 13a-14a.

6. On page 10, the *amicus* brief makes the remarkable assertion that "[a] private party's effort to obtain discovery in a case involving New Mexico law does not involve vital national interests of the United States," citing *In re Westinghouse Electric Corp. Uranium Contracts Litigation*, 563 F.2d 992, 999 (10th Cir. 1977). But the dis-

cussion at the cited page supports the contrary proposition. After acknowledging the legitimate national interest of the Government of Canada in the Canadian laws there at issue (563 F.2d at 998), the court said:

> "The United States admittedly has a 'national interest' of its own. In the instant case the United States has an interest in making certain that any litigant in its courts is afforded adequate discovery to the end that he may fully present his claim, or defense, as the case may be." 563 F.2d at 999.

While that case arose in the federal courts, there can be no doubt that the quotation is fully applicable to state courts as well. The great bulk of litigation in the United States occurs in state courts, and the United States manifestly has a strong interest in fair trials in those courts. The District Court in this case, attempting to ensure a fair trial of the issues before it, showed no disrespect for the Government of Canada by entering the order of November 18, 1977. See UNC Br. Opp. 5-9.

7. The remainder of the concerns in the *amicus* brief appear to relate to the Sanctions Order and Default Judgment, entered on March 2 and amended on March 27, 1978 (UNC Br. Opp. App. 1a).[3] That order, as we have

[3] The District Court did not "disput[e] the Canadian Government's interpretation of its own Regulations" or question "the authority of the Minister of Energy, Mines and Resources to address issues regarding the Regulations * * *." (Br. 11.) In the Recital that is cited (Pet. No. 77-1269 App. 14a; UNC Br. Opp. App. 14a), the District Court merely held that "GAC's writing a simple letter to a Canadian Minister who had been declared by law to have no authority to interpret Canadian Security Regulations or to grant a dispensation therefrom does not constitute a 'good faith' effort to secure the release of documents in Canada or the information contained in them." The *amicus* brief admits that the Minister in question, because of an intervening court decision, "no longer possessed the authority to grant a waiver of the Regulations" (Br. 5), and the Minister himself had written GAC that as a result of that decision, he was "not able to consider your request." Pet. No. 77-1236 App. 41a. The *amicus* brief does not attempt to show that the recital was unjustified in any way.

explained in detail in our brief in opposition, rested in substantial part on many discovery failures that have nothing to do with Canadian law—including failing to produce documents housed in Canada that GAC was ordered to produce long prior to adoption of the Canadian Regulations, deliberately storing documents in Canada to avoid discovery, and failing to make timely disclosure of cartel documents located in this country. UNC Br. Opp. 14-15. Furthermore, the order has not yet been reviewed by the New Mexico appellate courts. The *amicus* brief does not indicate how a default judgment that will soon be appealed and that is based on extensive findings of "utmost bad faith" in discovery "poses a continuing problem to international relations" (Br. 12). Nor does it explain why this Court should provide immediate appellate review of state trial court orders like those at issue here. The concerns of the *amicus*, at this stage of the proceedings, are appropriately addressed to the New Mexico appellate courts.

For the foregoing reasons, and for the reasons stated in our brief in opposition, the petitions for writ of certiorari should be denied.

Respectfully submitted,

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April 25, 1978.

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1236
No. 77-1237
No. 77-1269

GENERAL ATOMIC COMPANY,

Petitioner,

against

EDWIN L. FELTER, etc., *et al.*,

Respondents.

BRIEF OF RESPONDENT INDIANA & MICHIGAN ELECTRIC COMPANY IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO AND MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS TO THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT, SANTA FE COUNTY, NEW MEXICO

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April 17, 1978

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Indiana & Michigan Electric Company ("I&M") submits this brief in opposition to three petitions filed by General Atomic Company ("GAC") which seek to invoke the appellate jurisdiction of this Court: Nos. 77-1236 and 77-1269 request this Court to examine by certiorari the refusals of the New Mexico Supreme Court to issue extraordinary writs to review interlocutory orders of the state district court entered during the trial of *United Nuclear Corporation* v. *General Atomic Company, et al.* (*"UNC* v. *GAC"*), which is still continuing. No. 77-1237 seeks leave to file a petition to examine by mandamus an order of the state district court, which is currently before the New Mexico Supreme Court on GAC's appeal. A stay pending consideration of the several petitions was denied by this Court on March 20, 1978.

Questions Presented

In No. 77-1236:

1. Whether, on the facts of this case, the New Mexico Supreme Court was constitutionally required to issue an extraordinary writ to review mid-trial discovery rulings which were fully reviewable on appeal?

2. Whether the order denying such writ is not moot since entry of a later order, also interlocutory, finding GAC in default for bad faith noncompliance with numerous discovery obligations and resolving against it the issue of liability?

3. Whether the New Mexico Supreme Court was constitutionally required to issue an extraordinary writ to halt a state court trial because GAC contended that the trial might involve adjudication of an alleged "act of state" defense, when the actions of the trial court in respect of such defense were fully reviewable on appeal?

4. Whether the question of adjudicating the aforementioned defense is not moot in view of the entry of an order resolving the issue of liability without reaching the "act of state" defense?

In No. 77-1237:

5. Whether questions of compliance with the mandate of this Court in *General Atomic Company* v. *Felter,* No. 76-1640, —— U.S. ——, 98 S. Ct. 76 (Oct. 31, 1977), should be reviewed by this Court when they are pending on review in the New Mexico Supreme Court and the trial court fully complied with the mandate?

In No. 77-1269:

6. Whether the New Mexico Supreme Court was constitutionally required to issue an extraordinary writ directing a trial court to submit for review, in advance of entry, a mid-trial discovery order concerning the sanctions, if any, to be imposed for one of GAC's numerous failures to provide discovery?

7. Whether the denial of such writ was not rendered moot by the entry of an order imposing sanctions and a partial judgment on GAC for bad faith noncompliance with discovery?

Jurisdiction

We suggest that the issues raised in No. 77-1236 and No. 77-1269 have become moot. We also submit that the issuance of a writ of mandamus to an inferior state court, as requested in No. 77-1237, is without precedent or justification. While the jurisdiction of this Court may not be absolutely precluded by 28 U.S.C. § 1257(3) and § 1651, we submit that these petitions invite a procedure which law and discretion firmly counsel against, namely, interlocutory review of non-final orders of a state trial court before any reasonable opportunity for review by the New Mexico Supreme Court.

Counterstatement of the Case

We regret that GAC's statement of the facts is materially inaccurate. Because consideration of such petitions requires reference to parts of the proceedings in the trial court which are not adequately set forth in the petitions, this Brief in Opposition, submitted in all three cases, is longer than we would wish. Where none of the usual grounds for certiorari can be cited or exists, their absence can best be indicated by some explanation of the morass in which the Court is asked to become involved. We have, as far as possible, avoided asserting without citation, as GAC does, matters outside the record.[1]

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1. The substance of the petition in No. 77-1269 in fact seems to be an attack upon the trial court's March 2, 1978 Sanctions Order and Default Judgment (Pet. 1269, 2a), which had not even been issued when the New Mexico Supreme Court took the action sought to be reviewed. (The citation "Pet. 1269, 2a" refers to page 2a of the Petition in No. 77-1269. Other citations to petitions are in similar form.)

Background

In 1968 United Nuclear Corporation ("UNC") undertook to supply I&M with uranium and fabricated nuclear fuel (The contract is dated as of August 18, 1967). Later Gulf Oil Corporation ("Gulf") assumed the contractual obligation although UNC remained liable to I&M. Gulf contracted with UNC ("1973 Supply Agreement") to purchase the uranium needed to fulfill the contract with I&M and similar contracts with three other utilities, Detroit Edison Company ("Detroit"), Commonwealth Edison Company ("Commonwealth"), and Duke Power Company ("Duke"). GAC, a partnership composed of Gulf and Scallop Nuclear, Inc., was formed in 1974 and assumed, among other things, Gulf's contractual obligations to I&M, Detroit, Commonwealth and Duke and its rights against UNC under the 1973 Supply Agreement.

In December 1975 UNC sued GAC in the state district court in Santa Fe, New Mexico,[2] alleging, *inter alia,* that the 1973 Supply Agreement was invalid by reason of fraud, commercial impracticability, and violations of the New Mexico antitrust laws, N.M.S.A. §§ 49-1-1 through 49-1-3 (*"UNC* v. *GAC"*). I&M was not initially a party to *UNC* v. *GAC.*

GAC defaulted on its obligations to I&M, and in February 1976 I&M sued GAC and Gulf in federal court in New York (*"I&M* v. *Gulf"*, S.D.N.Y., No. 76 Civ. 881 (MEF)). This suit was dismissed for want of an indispensable party (UNC) on GAC's motion in January 1977.

2. A substantially identical suit by UNC against GAC and its constituent partners, separately named, was filed in state court in August 1975 but was voluntarily dismissed; a suit by UNC against I&M making similar allegations was filed in the District Court for McKinley County, New Mexico, and subsequently removed to the U.S. District Court for the District of New Mexico, where it is currently pending but inactive.

The Discovery Issues; GAC's Default (Nos. 77-1236 and 77-1269)

I&M was joined as a defendant in *UNC* v. *GAC* at the behest of GAC on January 21, 1977. GAC sought affirmative relief against I&M; I&M asserted claims against GAC and Gulf, one of its constituent partners.[3] The nonjury trial commenced on October 31, 1977. GAC's claim (Pet. 1236, 5) that the uranium cartel was not an issue until August 1977 ignores the facts that (a) UNC's complaint filed December 1975 pleaded antitrust causes of action; (b) in October 1976 I&M sought to plead antitrust claims in its case in federal court in New York, which was dismissed at the instance of GAC and Gulf; and (c) I&M renewed its antitrust claims in its pleadings in the court in New Mexico, beginning with its Answer and Counterclaim served March 4, 1977.

On November 18, 1977 the trial court entered an order, one of a series entered on motions by which UNC and I&M attempted to compel good faith disclosure by GAC,[4] finding (Pet. 1236, 2a) that GAC had deliberately housed cartel

3. Gulf is a party individually and in its own right because the partnership affirmatively commenced this proceeding against I&M, *Scott* v. *United States,* 354 F.2d 292 (Ct. Claims 1965), and is also liable individually for partnership obligations because its New Mexico statutory agent was served with summons. N.M.S.A. § 21-6-5. Gulf has not moved against the summons. Whether or not a separate "claim" (28 U.S.C. § 1441(c)) is stated against Gulf for removability purposes (Pet. 1269, 10) is a separate issue from whether Gulf is a party—which it is.

4. After undertaking to produce all relevant documents and to interview its present employees in Canada and the United States to answer interrogatories, GAC served responses on September 26, 1977 which produced virtually no documents, provided merely lists of documents and included self-serving definition sections, but furnished hardly any responsive information, and took the position for the first time that to produce any Canadian documents would violate the Canadian Uranium Security Regulations. In its original motion UNC argued, partly in reliance upon deposition evidence from a former Gulf Minerals Canada Limited ("GMCL") employee (L. T. Gregg), that GAC and Gulf had a deliberate policy of placing documents in Canada to avoid U.S. process. UNC Memorandum 9/30/77, at 5, 6. GAC did not rebut this proof. The trial court, on October 11,

documents in Canada to prevent discovery, and it ordered GAC to "identify" all relevant cartel documents in Canada. It did not direct GAC to produce documents contrary to Canadian regulations but stated that, if they were not produced, facts provable from them would be found against GAC. It also scheduled submission of proposed findings and briefs.

GAC did not then seek relief from the November 18 order in the state supreme court. On December 9, 1977, however, I&M (joined by UNC and Detroit) moved again to compel GAC to provide complete and good-faith responses to certain interrogatories, pointing out that GAC had not provided information damaging to GAC which other sources demonstrated it had in its possession, had refused even to list relevant documents located in Canada, and had made no inquiry of any employees in Canada despite having promised to do so.[5] On December 27, 1977, the trial court granted I&M's motion in part, directing good-faith, non-evasive answers and giving leave to apply for further relief under Rule 37 of the New Mexico Rules of Civil Procedure (which parallels F.R.Civ.P., Rule 37) should GAC's answers remain inadequate.

1977, directed GAC to answer in good faith or face sanctions (Pet. 1236, 28a-33a). The November 18 order arose out of a motion for sanctions addressed to GAC's supplemental answers. Again GAC claimed that it was unable to furnish the Canadian documents but made no effort to rebut the claim that it had deliberately lodged cartel documents in Canada to avoid production (Trial Tr. 11/16/77, 11-43 to 75).

5. For example, I&M had obtained minutes of cartel meetings from Gulf files, which had been sent to GMCL by cartel officials. GAC took the position that it had no knowledge of such meetings, much less what happened there, unless one of its present U.S. employees had attended them (GAC Supplemental Answers to UNC's Second Interrogatories, 10/20/77, 3). At the same time, it denied that certain events reflected in the minutes had ever occurred (I&M Memorandum 12/9/77, 8). GAC's contention that the February 1978 motions by I&M and UNC for Rule 37 sanctions "raised for the first time allegations of general bad faith" (Pet. 1269, 7) in disclosure about the cartel is simply erroneous.

On January 5, 1978 GAC petitioned the state supreme court for "Mandamus and Prohibition Under Power of Superintending Control" to review, *inter alia*, the November 18, 1977 order, requesting a stay of the trial and an alternative writ[6] directing responsive pleadings, settlement of a record, and briefs. Without requesting responses the court, on January 11, 1978, heard oral argument and refused, without opinion, to issue the alternative writ. This order is the subject of the petition No. 77-1236.

The argument of January 11, 1978 clearly establishes that the New Mexico Supreme Court was unwilling to indulge GAC's use of an extraordinary writ as a premature appeal (Tr. 1/11/78, 23; *id.* 59, 66, 67). GAC's counsel frankly conceded that the merits of the trial court's orders could not be considered unless the court granted the alternative writ and ordered up a substantial record. (Tr. 1/11/78, 66-68). On February 1, 1978, when GAC moved for a stay pending certiorari, the state supreme court again made clear that in denying the petition it acted without prejudice to an appeal, reserving all issues for review on appeal (Tr. 2/1/78, 8-10). GAC's counsel recognized that the court had acted out of concern over prematurity and "piecemeal appeals" (Tr. 2/1/78, 12) and conceded that the November 18 order was not final for appellate purposes (Tr. 2/1/78, 15-16).[7]

6. This "alternative writ" procedure—in function an order to show cause directed to the trial court—is customary in New Mexico for petitions to review decisions of an inferior court.

7. The state supreme court directed that the trial court, before imposing sanctions for failure to make discovery, give notice sufficient to permit the parties to make further motions in the supreme court. (Pet. 1236, 47a). Responding to that direction, the trial court issued a notice (Pet. 1236, 51a) on Febuary 20, 1978 of its intention to enter a sanctions order on or after March 1, 1978. GAC then made a motion in the state supreme court to stay any Rule 37 sanctions order.

GAC served supplemental interrogatory answers on February 1, 1978; I&M and UNC again moved for Rule 37 sanctions on the ground that the answers were defective, violative of the court's orders, and made in bad faith. I&M noted, *inter alia,* that (a) GAC's answers contradicted prior representations of its counsel and responses Gulf had provided to a Federal Grand Jury in Washington, D.C. investigating the uranium cartel; (b) GAC withheld information known to its former employees who were employed while the case was pending; (c) GAC refused to provide information known to employees or attorneys in Canada, although it had undertaken to do so and had been ordered to do so; (d) GAC's answers were on their face self-contradictory as to such basic matters as cartel meetings and the cartel rules; (e) certain of GAC's answers were demonstrably false; (f) GAC withheld information about Gulf's negotiations to sell its Canadian uranium to United States customers; (g) GAC refused to make discovery about the cartel's predatory conduct toward Westinghouse Electric Corporation, although there is clear evidence of such conduct; and (h) GAC refused to provide any factual basis for its defense that Gulf was forced to join the cartel and to fix quotas and prices.

On February 20, 1978 GAC renewed its request in the state supreme court for an alternative writ, seeking a stay of any sanctions the trial court might impose under Rule 37 and review of any such sanctions *prior* to their entry. GAC did not assert that due process required such pre-entry review and thus cannot comply with Rule 23(f) of this Court. At argument on March 1, 1978, opposing counsel argued that GAC's application was defective under New Mexico law, viewed either as a new petition, because unsworn (Rule 12(a), N.M.R. App. P.); or as a renewal of the petition dismissed on January 11, 1978, because there is no provision in New Mexico for such renewal. I&M and

UNC argued against a stay of sanctions, pointing to their pending Rule 37 motions, based on GAC's persistent refusal over two years to provide complete, good-faith responses to interrogatories and document production. GAC responded that these motions were not before the court (Tr. 3/1/78, 13). The court on March 2, 1978 refused the requested stay or the alternative writ (Pet. 1269, 1a). That decision is the basis of the petition in No. 77-1269.

The trial court on March 2, 1978 acted on the motions of I&M and UNC, found GAC in default on the issue of liability, and entered the "Sanctions Order and Default Judgment." That order is interlocutory and has since been amended.[8] GAC has not yet sought to bring it before the New Mexico Supreme Court. Instead, it urges this Court to disregard the usual jurisdictional limits and review the trial court's order as a matter "ancillary" (Pet. 1269, 15) to the order of the New Mexico Supreme Court.

The Arbitration Issues (No. 77-1237)

On April 2, 1976, before I&M was made a party to *UNC* v. *GAC,* the trial court enjoined both parties from initiating new proceedings concerning the matters in suit (Pet. No. 76-1640, la). GAC petitioned the New Mexico Supreme Court for review by mandamus.[9] That court denied relief,

8. The sanctions order was amended by the trial court on March 27, 1978; the full text of the amended order is an appendix to UNC's brief in response to the petitions for certiorari.

9. I&M was not a party to this proceeding. GAC sought simultaneously (a) an order dissolving the injunction and (b) a direction that I&M, Detroit, Duke, and Commonwealth be joined in *UNC* v. *GAC* on the ground that they were parties necessary for "a just adjudication." GAC sought no stay of the proceedings in *UNC* v. *GAC,* nor did it assert a desire to arbitrate; rather, it argued that the four utilities should be joined in the pending state action to prevent GAC's obligations to deliver to the utilities from being adjudicated separately from UNC's obligations to deliver to GAC, creating the possibility of "inconsistent" results.

and GAC sought certiorari in this Court (Pet. No. 76-385). GAC's petition said nothing about arbitration but claimed that its effort to join UNC in *I&M* v. *Gulf* under F.R.Civ.P. Rule 14 was stymied by the Santa Fe court's order (Pet., No. 76-385, 2, 10, 12-16). GAC told this Court that a ruling on the contested injunction would not "advance the termination of the Santa Fe litigation . . ." (Reply No. 76-385, 5).

This Court granted certiorari and remanded for clarification of whether the decision below was based on a non-federal ground. *General Atomic Company* v. *Felter,* 429 U.S. 973 (1976). After clarification GAC again sought certiorari (Pet. No. 76-1640). GAC repeatedly stressed that its

> "great concern was to avoid the threat of inconsistent adjudications posed by the UNC litigation and UNC's refusal to supply the required uranium, on the one hand, and threatened litigation by the utilities seeking to compel GAC to perform the utility contracts originally made by UNC, on the other" (*id.* 8),

adding that as to the I&M and Detroit contracts, which have no arbitration provision, the threat had now been averted: GAC had secured dismissal of *I&M* v. *Gulf* "[u]pon GAC's undertaking to attempt to join I&M in the Santa Fe action." I&M and Detroit were so joined on January 21, 1977 at GAC's request (*id.* 12). GAC said that the problem persisted as to the Duke and Commonwealth contracts, since those utilities had invoked their contractual right to arbitrate with GAC (Pet. No. 76-1640, 13-15, 20-24).[10]

10. GAC specifically denied having plans for federal litigation against UNC outside New Mexico, except to bring UNC into proceedings brought by the utilities against GAC (*id.* 20n), and conceded that it could compel UNC to arbitrate in federal court only "in an impleader context" employing "ancillary jurisdiction" (*id.* 22n),

On this record this Court held on October 31, 1977 that the injunction should be vacated insofar as it barred *in personam* actions in federal courts. *General Atomic Company* v. *Felter,* _____ U.S. _____, 98 S.Ct. 76 (Oct. 31, 1977). This Court observed that the principal federal litigation which GAC sought to pursue was the defensive impleader of UNC in proceedings by utilities against GAC to reduce the "risk of inconsistent adjudication" (*id.* 79 n.11). In due course the trial court modified the injunction to exclude "all *in personam* actions in Federal Courts and all other matters mandated to be excluded . . . by the opinion" of this Court (Pet. 1237, 27a).

Reversing the position it took in this Court, GAC then served upon UNC a demand to arbitrate with UNC alone issues arising under the 1973 Supply Agreement.[11] GAC's demands excluded issues relating to I&M and Detroit.[12]

GAC did not avail itself of its right, confirmed by this Court's mandate, to initiate federal litigation. Instead, on December 6, 1977 it moved the trial court for a stay of

since there is no diversity between UNC and GAC (see also Reply No. 76-1640, 10n, 13n (July 27, 1977)). The Federal Arbitration Act has been construed consistently not to provide a basis for federal-question jurisdiction. *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.,* 271 F.2d 402 (2 Cir. 1959), *appeal dismissed,* 364 U.S. 801 (1960); *The Mengel Co.* v. *Nashville Paper Products & Specialty Workers Union,* 221 F.2d 644 (6 Cir. 1955); Wright, Miller and Cooper, *Federal Practice and Procedure,* § 3569 (1975 ed.). GAC had opposed arbitration with Duke and Commonwealth but lost. *See General Atomic Company* v. *Duke Power Co.,* 420 F. Supp. 215 (W.D.N.C. 1976); *Commonwealth Edison Co.* v. *Gulf Oil Corp.,* 541 F.2d 1263 (7 Cir. 1976).

11. GAC also served upon UNC demands to arbitrate under the Duke and Commonwealth contracts.

12. GAC's demand to arbitrate pursuant to the 1973 Supply Agreement states:

> "2. Utility Issues excluded from the scope of this arbitration demand are those issues relating to GAC's obligations (if any) to Detroit Edison Company and Indiana & Michigan Electric Company under certain agreements with those utilities.

proceedings not only on the issues on which GAC demanded arbitration but also on issues not within its demands.[13] The trial court found on December 16, 1977, (i) that the Duke and Commonwealth contracts gave GAC no right to arbitrate with UNC, (ii) that GAC had committed numerous acts of waiver by, *inter alia,* its participation in litigation both before and after the injunction reviewed in No. 76-1640 and had expressly waived arbitration under the 1973 Supply Agreement in its answer, and (iii) that nonarbitrable antitrust issues were intertwined with issues that GAC sought to arbitrate (Pet. 1237, 1a-8a). The court refused to stay the trial and stayed GAC from pursuing the arbitration demands (Pet. 1237, 10a), with the proviso

> ". . . that this Partial Final Judgment shall not, in and of itself, operate to preclude Defendant General Atomic Company from asserting claimed federal rights in appropriate judicial proceedings." (*id.*)[14]

GAC appealed to the New Mexico Supreme Court and moved that court to stay the entire trial and expedite the

> It is GAC's desire that to the extent possible any disputes between GAC and UNC regarding the meaning of the utility contracts or GAC's obligation under those utility contracts be resolved in appropriate forums where the representative utility, GAC and UNC are all present." (Pet. 1237, 43a).

Since neither Detroit nor I&M had any agreement to arbitrate, the appropriate forum where they would be present with UNC and GAC was the New Mexico trial court.

13. GAC's statement that it "requested Judge Felter to stay trial proceedings with respect to issues subject to these arbitration demands" (Pet. 1237, 9) is misleading. While GAC initially excepted some issues (GAC Motion, 11/30/77), by the time it got to the state supreme court (GAC Reply to I&M brief, 3/30/78, 1) and this Court (Pet. 1269, 13; Pet. 1237, 1) it insisted on a stay as to all issues on trial.

14. On December 27, 1977 the court amended its decision to make clear that GAC's asserted right to a stay under the Federal Arbitration Act, 9 U.S.C., § 1, *et. seq.*, was also adjudicated (Pet. 1237, 11a-19a).

briefing schedule on the arbitration appeal. After argument that Court by order dated January 13, 1978 denied the stay and postponed the scheduling issue until the transcript was filed, whereupon "we will consider an abbreviated schedule of briefing and set the cause down for oral argument as soon as possible." (Pet. 1237, 22a).

On January 26, GAC again asked the state supreme court to stay the trial pending GAC's petition in this Court (which was never filed) with respect to the January 13, 1978 order. The stay was denied on February 1, 1978 (Pet. 1237, 23a). The state supreme court expedited the briefing schedule on February 22, 1978 but later extended it at GAC's request. The appeal has been briefed and awaits argument, scheduled for May 2, 1978. GAC has advised the New Mexico Supreme Court that:

> "General Atomic Company's Motion for Leave to File a Petition for Writ of Mandamus in the United States Supreme Court does not seek review of all arbitration questions pending in this Court. It seeks only immediate extraordinary relief concerning GAC's claims that Judge Felter has violated the prior decision of that court which invalidated his previous injunction. It was filed only after this Court three times declined to stay the trial or otherwise to grant GAC immediate relief from Judge Felter's orders (See this Court's Orders of January 13, 1978, February 1, 1978 and March 2, 1978)." (Appellant General Atomic Company's Reply Brief, No. 11,775, N.M.S.-Ct., March 30, 1978, vii).

Currently GAC is urging in the New Mexico Supreme Court appeal that (a) the trial court acted inconsistently with the mandate in No. 76-1640, (b) the Federal Arbitration Act governs the proceedings because of the nature of the contracts involved, (c) the trial court erred in finding waiver, (d) waiver is an issue for the arbitrators, (e) state

antitrust claims were erroneously held nonarbitrable, (f) the trial court erroneously construed the Duke and Commonwealth contracts in finding GAC could not require UNC to arbitrate thereunder, and (g) the trial court erred in finding waiver from record facts without an evidentiary hearing. It is therefore not clear what questions GAC would have this Court consider without the benefit of review by the state supreme court, but they are apparently numerous as well as obscure.

Reasons for Denying the Writs

I.

In the Certiorari Proceedings (Nos. 77-1236 and 77-1269)

a. The decisions below rest upon an adequate and independent state ground, and the issues are moot.

The decisions of the New Mexico Supreme Court of January 11, 1978 and March 2, 1978 were based upon adequate and independent state grounds. The statements at argument make it plain that the court did not consider and rule upon the merits of GAC's attack on the November 18 order. (Tr. 1/11/78, 59-66; Tr. 2/1/78, 8-10, 12, 14-18). GAC conceded that the court could not undertake review of that order unless it first issued an alternative writ and directed preparation of a record to determine the bases of the trial court's order. (Tr. 1/11/78, 66-68). The court issued no writ and requested no record. Plainly it dismissed the January petition on a procedural ground, the obvious one being that the court viewed an extraordinary writ proceeding in the middle of a pending trial, to review the bases for an interlocutory discovery order which did not even specify sanctions, as a needless and inappropriate mode of procedure, when the same issues could be resolved

on appeal if they still remained after final judgment. Subsequent events confirmed the wisdom of this approach, since the trial court soon granted I&M's and UNC's Rule 37 motions, made after the November 18, 1977 order, and imposed sanctions for GAC's discovery misconduct throughout the case.

We respectfully submit that the November 18 order, except to the extent it is reflected in the March 2, 1978 "Default Judgment and Sanctions Order," as amended, has exhausted its effect and is now moot, and that any further proceedings in this Court predicated on that order are similarly moot.

If GAC claims (in No. 77-1269) a constitutional right to interlocutory review of Rule 37 sanctions *before* they are made public, that issue is moot because the sanctions have been entered. If GAC claims a right to such review *after* sanctions are imposed, it cannot press that claim in this Court because it has not yet been made in the state courts.

GAC seems to concede (Pet. 1269, 15), as it must, that its application of February 20, 1978 was dismissed on state procedural grounds. Indeed, GAC claims that the decision not to hear its claims *instanter* violated its federally protected rights (Pet. 1269, 5, 12, 15). Understandably, this argument is advanced without case support; it has no merit. The same antipathy to piecemeal review prevails in the federal system without colorable constitutional challenge, *see Kerr* v. *United States District Court,* 426 U.S. 394 (1976); moreover, the states are free to choose among various systems of interlocutory or final-order review since in general there is no constitutional obligation to provide any appellate review, *Ortwein* v. *Schwab,* 410 U.S. 656, 660 (1973); *Griffin* v. *Illinois,* 351 U.S. 12, 18 (1956), and the timing of such review as may be provided raises no constitutional issue, especially in a case like this where there is no irreparable harm.

The New Mexico cases make clear that extraordinary writs may not be employed to raise issues which will later be reviewable on appeal. *See, e.g., Baca* v. *Burks,* 81 N.M. 376, 378, 467 P.2d 392, 394 (1970); *Alfred* v. *Anderson,* 86 N.M. 227, 230, 522 P.2d 79, 82 (1974). It cannot be contended that such principles of appellate economy do not constitute an adequate state ground when similar rules are mandated for the federal system. *See, e.g., Kerr* v. *United States District Court, supra,* 426 U.S. at 402 (1976); Ex parte *Fahey,* 332 U.S. 258 (1947).

A state court ruling which rests upon an independent and adequate ground of state law, such as well-established local procedural rules, is inappropriate for review. *Wolfe* v. *North Carolina,* 364 U.S. 177, 193 (1960). *See also Air Pollution Variance Board* v. *Western Alfalfa Corp.,* 416 U.S. 861, 866 (1974); *Wainwright* v. *Sykes,* 433 U.S. 72, 86-87 (1977). This Court recently stated:

> "If the judgment below rested on an independent and adequate state ground, the writ of certiorari should be dismissed as improvidently granted, *Wilson* v. *Loew's Inc.,* 355 U.S. 597 (1958), for '[o]ur only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.' *Herb* v. *Pitcairn,* 324 U.S. 117, 125-126 (1945)." *Zacchini* v. *Scripps-Howard Broadcasting Co.,* 433 U.S. 562, 566 (1977).

The review GAC seeks in No. 77-1236 would be doubly advisory, since the court below refused to consider the issues for sufficient state-law reasons, and the order sought to be reviewed is moot.

Were this Court to view the widely-shared procedural concerns of the state supreme court as falling short of an independent and adequate state ground, we submit that the only relief available to GAC in this Court would be a remand for consideration of the federal issues, because the record in the abbreviated proceeding below is inadequate for consideration of such issues in this Court. The abstract nature of GAC's present complaints provides a further strong argument against a grant of discretionary review. *See, e.g., Wainwright* v. *City of New Orleans,* 392 U.S. 598 (1968); *Rescue Army* v. *Municipal Court,* 331 U.S. 549 (1947). Moreover, since appellate review on a full record in New Mexico is foreordained it would serve no purpose to grant certiorari.

b. The ruling below adheres to this Court's decision in *Société Internationale* v. *Rogers.*

Contrary to GAC's current claim (Pet. 1269, 14-15) nothing the trial court did on November 18, 1977 or March 2, 1978 raises any questions under this Court's ruling in *Société Internationale* v. *Rogers,* 357 U.S. 197 (1958).

GAC charges, wrongly, that the trial court "provided no opportunity" (Pet. 1269, 15; see also Pet. 1269, 7-8) for a hearing on GAC's discovery efforts. In fact GAC's refusal to answer interrogatories was briefed at great length and appears of record, its nonproduction of documents is undisputed, the reasons for such nonproduction were the subject of a hearing at which GAC offered testimony and GAC has proffered affidavits on the same question. Since GAC does not contest on these petitions the recitals of fact set forth in the March 2, 1978 order it is established for present purposes that Gulf maintained its sensitive cartel records in Canada to prevent discovery; the evidence, the admissibility of which was stipulated, is to the same effect. GAC points to no disputed factual issue on which it should have

had a hearing, and the trial court made lengthy findings concerning GAC's persistent bad faith in document production and every other aspect of the discovery process (Pet. 1269, 4a-17a). If these findings are to be reviewed in this Court, such review should not be based on such lawyers' arguments as the "brief review" of GAC's discovery allegations (Pet. 1269, 36a-39a),[15] but rather on a full record after the trial court has made them final,[16] and the New Mexico Supreme Court has considered them. As yet that court has seen neither the findings nor the record.

The trial court scrupulously followed the teachings of *Société*. GAC was not ordered to violate Canadian criminal law (Pet. 1236, 13-15, 17); the trial court's October 11, 1977 order required GAC to produce documents only "[i]nsofar as it is lawful so to do" (*id.* 32a), a qualification the court repeated on December 27, 1977 (*id.* 44a-46a). The November 18, 1977 order expressly says that if the documents could not lawfully be produced despite GAC's best efforts, the court would not require their production in violation of Canadian law but would instead consider what Rule 37 sanctions were appropriate on the facts (*id.* 45a). This procedure follows precisely the course laid down in *Société*, where this Court held that a party was correctly directed to produce documents despite possible Swiss law prohibitions (357 U.S. at 204-06) and that all the reasons for nonproduction would be examined in considering sanctions (*id.* 208-13).[17] As to such reasons, the government charged

15. The "brief review" is grossly inaccurate. For example, it states that counsel for UNC disclaimed any desire for production of documents in Canada (Pet. 1269, 38a). In fact, the remarks quoted by GAC out of context refer to an audacious attempt by GAC to assert foreign law as an obstacle to production of cartel evidence already in the United States.

16. *See* note 8 *supra*.

17. The evidence in *Société* showed that the party undertook just the sort of "diligent and long-term negotiations" with a foreign government that GAC says courts may not require (Pet. 1269, 9). *See* 357 U.S. at 201-03.

in *Société* that the party currently unable to produce documents had years before brought itself into the ambit of Swiss secrecy laws to hinder disclosure, and the Court said that, if proved, such facts would have a "vital bearing" on the case:

> "In other words, the Government suggests that petitioner stands in the position of one who deliberately courted legal impediments to production of the Sturzenegger records, and who thus cannot now be heard to assert its good faith after this expectation was realized. Certainly these contentions, if supported by the facts, would have a vital bearing on justification for dismissal of the action, but they are not open to the Government here." 357 U.S. at 208-09.

Here, the trial record emphatically supports the recitals of fact (not here disputable) in the March 2, 1978 "Sanctions Order and Default Judgment" that Gulf deliberately kept its cartel files in Canada to be out of subpoena range (Pet. 1269, 15a-16a),[18] precluding any further claims of good faith. Thus, the trial court's sanctions do not rest solely on the insufficiency of GAC's court-ordered efforts to produce the evidence hidden in Canada, as GAC suggests (Pet. 1236, 6-10). Even so, GAC's last-minute meeting with Canadian officials gave more proof that GAC's discovery efforts were insufficient and that likely avenues of disclosure had been overlooked.[19] In any event, the sanc-

18. A similar finding appears in the November 18, 1977 order (Pet. 1236, 3a).

19. The "report" by GAC's lawyers on the March 3, 1978 meeting (Pet. 1269, 43a) postdates the decision below and obviously was not in the record, but it shows that Canadian government lawyers took the view that (a) Canadian employees could disclose nondocumentary information about the uranium cartel, (b) it was unclear what identification of uranium cartel documents was permissible, and in any case (c) no Canadian government officials could construe the nondisclosure regulations, since their interpretation is for the Canadian courts (Pet. 1269, 46a-48a).

tions ordered by the trial court were based not only on nonproduction of Canadian documents but on a long history of wholesale resistance to discovery.

GAC's assertions that the trial court erroneously overrode Canadian policy in violation of *Zschernig* v. *Miller,* 389 U.S. 429 (1968), similarly cannot withstand examination.[20] To the contrary, as to the Canadian regulations impeding document production, the trial court hewed to the precise precedent of *Société,* where this Court outlined procedures for handling the difficult but unavoidable problems of foreign-law obstacles to discovery.[21] Thus, the trial court ordered the production of documents from Canada not because it rejected Canadian law but because GAC concededly failed to comply with discovery requests, and the

20. In *Zschernig* this Court recognized that state courts are required to construe foreign laws at times, 389 U.S. at 433, but held that the Oregon legislature had infringed on the exclusive presidential and congressional power to conduct foreign affairs by imposing inheritance rules which directed application of arbitrary, highly subjective and critical standards to the laws of foreign, and particularly "iron curtain" countries. Particularly bothersome to the Court in *Zschernig* was the statute's call for judicial interpretation which "led into minute inquiries concerning the actual administraton of foreign law, into the credibility of foreign diplomatic statements, and into speculation whether the fact that some received delivery of funds should "not preclude wonderment as to how many may have been denied 'the right to receive' . . ." *id.* 435. The trial court here did not indulge in such an abrasive inquiry; indeed all adjudication ceased except as to damages, because of GAC's refusal to provide discovery.

21. The petitioner in *Société* did not argue that United States courts should affirmatively enforce a foreign confidentiality law, but the opinion (357 U.S. at 212) precludes such a contention, at least in the absence of a treaty or similar agreement, a matter not involved here. *United States* v. *Belmont,* 301 U.S. 324 (1937), and *United States* v. *Pink,* 315 U.S. 203 (1942), cited by GAC (Pet. 1236, 3), likewise involved the effect of treaties and executive agreements. *United States* v. *Curtiss-Wright Export Corp.,* 299 U.S. 304 (1936) is even more irrelevant.

structure of Rule 37 requires a judicial order before sanctions may be considered, as contemplated by *Société.*[22]

The Rio Algom case, In re *Westinghouse Electric Corp. Uranium Contracts Litigation,* 563 F.2d 992 (10 Cir. 1977), is likewise consistent with the trial court's ruling, for there the court noted that the company acted in good faith and that it had not deliberately shielded documents from disclosure under foreign law. *See* 563 F.2d at 996, 998.[23] This case presents facts opposite from those in the Rio Algom case and *Société—i.e.,* here there was proof that documents were lodged in Canada to avoid discovery—but it was decided on the same principles. Any claim of conflict is specious.

c. There has been no departure from the act of state doctrine.

It is clear even from the incomplete record before the Court that the trial court has not offended the act of state doctrine. GAC concedes that the act of state doctrine applies when a court "adjudicate(s) the legality of the acts of a foreign nation on its own territory" (Pet. 1269, 14). This Court has said:

> "The act of state doctrine in its traditional formulation precludes the courts of this country from inquir-

22. In its order denying GAC's motion for reconsideration of the November 18, 1977 production order, the trial court recognized the procedural necessity of the November 18, 1977 order:

> "Alternatively, should identification of the aforesaid documents housed in Canada, *at this time* be deemed to constitute a violation of Canadian law, which premise has not been shown to the satisfaction of this Court, still the order of November 18, 1977, must stand as the predicate to appropriate relief under Rule 37 of the Rules of Civil Procedure and in keeping with the Court's prior rulings herein." (Pet. 1236, 45a) (emphasis in original).

23. The court in *Westinghouse* also read *Société* as holding that "a local court has the power to order a party to produce foreign documents despite the fact that such production may subject the party to criminal sanctions in the foreign country." 563 F.2d at 997.

> ing into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 401 (1964).

The doctrine does not apply to acts of government personnel lacking "sovereign authority" in the premises, *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 692 (1976); *see also The "Gul Djemal"*, 264 U.S. 90 (1924), nor does it shield commercial activities of foreign governments. *Dunhill, supra*, 425 U.S. at 695-706.

Fundamentally, the act of state doctrine cannot apply here because the trial court could not begin to "adjudicate the legality" of the uranium cartel on the merits,[24] since GAC refused discovery; instead the court imposed sanctions based on GAC's deliberate misconduct.

In any event, the trial court could not offend the act of state doctrine had it merely examined the facts to see whether the doctrine applied. Application of the doctrine requires taking evidence. GAC itself pleaded act of state in its answer to I&M's antitrust claims ("Eleventh Defense"), and it has the burden of proof of such defenses. *Dunhill, supra*, 425 U.S. at 691. GAC could scarcely complain if the court adjudicated the merits of GAC's own affirmative defense.

Moreover, but for GAC's default, the trial court would have had to consider the price-fixing claims to deal with the contract issues. GAC ignores the fact that the cartel-caused

24. Thus GAC's suggestion that the trial court should have sought the views of the State Department as to the foreign-relations effect of an adjudication on the merits (Pet. 1236, 13 n.8) is irrelevant, because no such adjudication was undertaken. Moreover, this Court has specifically cautioned against judicial requests for a statement of position by the Executive. *Banco Nacional de Cuba* v. *Sabbatino*, *supra*, 376 U.S. at 436. Here the Department of State has expressly volunteered, in forwarding Canadian diplomatic notes, that "Transmittal of these documents should not be understood as having implications with respect to foreign affairs of the United States" (Pet. 1236, 8a).

price increase, and GAC's role in it, bore directly on GAC's dispute with I&M over contractual relief, *i.e.*, GAC would be estopped from asserting a cartel-caused increase in price as an equitable excuse for escaping its contract with I&M. Resolving this issue required consideration of the facts of the cartel, although it might not necessitate an adjudication of the "legality" of the arrangement.

Had the court reached the merits of the act of state defense, GAC would have lost. GAC's lengthy recital of the supposed history of the cartel (Pet. 1236, 4-6) is mere lawyers' argument, wholly unsupported by the record in either court below and unsupported in fact. Even with inadequate discovery I&M and UNC offered evidence below showing that any involvement of Canadian government people in the uranium cartel was outside even their purported statutory authority and Gulf so knew,[25] that private producers (including Gulf) and government-owned commercial companies had formed and used the cartel to exchange market information, plot against middlemen, and fix prices for the world, including the United States, and that they met not only in Canada, but in South Africa, Switzerland, France, England, Australia, and the Canary Islands as well. None of the acts urged as the basis of GAC's liability was required by the Canadian government. The act of state defense was never intended to shield or disguise such conduct.

25. GAC produced in discovery a letter from its Canadian counsel advising that insofar as any Canadian officials sought to encourage Gulf's participation in cartel meetings, such officials were not acting on the basis of any statutory authority (T-I&M-3759). *See Dunhill, supra*, 425 U.S. at 695.

We submit that the concern the Canadian government[26] has expressed over the trial court's decision is based upon a misunderstanding of the sanctions order, which does not adjudicate the legality of the uranium cartel nor penalize GAC for complying with Canadian law, but instead rests on a broad range of discovery defaults. Such a misunderstanding does not create any issue worthy of review at this interlocutory stage.

d. There is no justification for review by common-law writ.

Finally, GAC urges this Court to review the trial court's March 2, 1978 Sanctions Order, possibly by common-law certiorari under 28 U.S.C. § 1651, because it is somehow "ancillary" to the New Mexico Supreme Court's ruling of that date and because an application for review in that court would seek "the same relief which that Court has already denied twice," on January 11 and March 2, 1978 (Pet. 1269, 15-16). This argument contradicts the statements of GAC's counsel before the New Mexico Supreme Court on March 1, 1978 concerning the Rule 37 motions then pending:

> "Yes, there is a question of an evidentiary hearing pending. Yes, there are fact questions of bad faith. Yes, there is a wide range of sanctions that may be imposed for an alleged two-year history to make nondiscovery. But that is not before this Court. What

26. Neither the lengthy unsworn position paper in GAC's Appendix (Pet. 1236, 13a-25a) nor the various Canadian diplomatic notes purport to state facts constituting an act of state with respect to the formation and operation of the uranium cartel. Even had they done so, this Court has held that such after-the-fact statements of position do not rise to the status of, nor may they retroactively characterize past conduct as, an act of state, and that they cannot be considered at all unless their authors are available for cross-examination under oath, which is not the case here. *Dunhill, supra,* 425 U.S. at 691-92 n.8, 694-95.

> is before this Court is the November 18 order reaffirmed on two separate occasions before those motions were ever filed." (Tr. 3/1/78 at 32).

Thus GAC itself urged the New Mexico Supreme Court to view the November 18 order as an issue separate from the history of massive nondisclosure asserted by I&M and UNC as the basis for Rule 37 sanctions, which GAC asked the Court to disregard. GAC even tried to present the November 18 order in the New Mexico Supreme Court outside the context of evidence of bad faith which supported the findings of fact in that order. GAC cannot now claim that the trial court's broadly based Sanctions Order of March 2, 1978 should be reviewed as a matter "ancillary" to the narrow procedural issue it presented to the New Mexico Supreme Court (Pet. 1269, 15).

The state supreme court rejected GAC's request to preempt a broad-based sanctions order by staying all Rule 37 sanctions. It held also that it would not review the November 18 order in a vacuum and that the trial court should apply Rule 37 based on the evidence of misconduct not available to the appellate court, subject to appellate review. Notably, GAC has not sought state supreme court review of the trial court's sanctions, preferring instead to continue in this Court its pursuit of review, not of the trial court's decision, but solely of the procedural order of the state supreme court which refused to preclude entry of a sanctions order. We need not speculate about GAC's reasons for pursuing this peculiar course and merely note that no accepted principle suggests a constitutional requirement that an appellate court "pre-clear," before entry, an order imposing sanctions for willful failure to discover.

GAC cannot claim that state court review of the March 2 sanctions order would be repetitive nor that "the relief sought is not available in any other court" than this one.

(Rule 31 (3)). Indeed it acknowledges that the March 2, 1978 order will be reviewed on appeal to the New Mexico Supreme Court (Pet. 1269, 12) and states that "the factual questions regarding good faith involved in the Sanctions Order and Default Judgment . . . GAC has expressly *not* sought to have reviewed here" (GAC Reply Memorandum on Application For Stay 3/15/78, 8-9) because they "may, and should, be reviewed in the New Mexico appellate courts" (*id.* 5).

Since GAC has not sought review of the findings of the trial court underlying the default judgment and sanctions order in this proceeding, review would be an empty exercise which this Court should not undertake, especially when it would exceed the authorization of 28 U.S.C. § 1257 (3) and thus be inconsistent with "the purpose of Congress . . . to keep within narrow confines [this Court's] appellate docket . . . ," a purpose which this Court has observed in another context should be honored "with redoubled vigor when the action sought to be reviewed here is an interlocutory order of a trial court." *Goldstein* v. *Cox,* 396 U.S. 471, 478 (1970). The order in question has been amended already at the trial level and will certainly be reviewed on appeal. No reason exists for this Court to reach out to review it now.

II.

In the Mandamus Proceeding (No. 77-1237)

a. This Court should not exercise mandamus jurisdiction over a state trial court.

The motion for leave and petition for mandamus in No. 77-1237 raise a threshold problem of this Court's jurisdiction, inasmuch as the petition seeks a writ of mandamus addressed, not to the New Mexico Supreme Court, the highest court of the state which has jurisdiction, but to an

inferior state court. We know of no case in which this Court has directed a mandamus to an inferior state court.

Neither of the cases relied upon by GAC to support jurisdiction seems in point. *Deen* v. *Hickman,* 358 U.S. 57 (1958), involved mandamus to the Texas Supreme Court, the highest state court. *Vendo Co.* v. *Lektro-Vend Co.,* 46 U.S.L.W. 3469 (Jan. 23, 1978), considered but did not grant a requested direction, in the nature of mandamus, to an inferior federal court which had erroneously interpreted this Court's mandate, and failed to act promptly to vacate an injunction. Assuming *arguendo* that this Court might issue mandamus to a federal district court in such circumstances, such an exercise of supervisory power over an inferior federal court does not support a similar power with respect to inferior state courts. Considerations important to the administration of a federal system, respect for the separate judicial systems of the States, and the Congressional scheme for review of state decisions by this Court counsel against existence or exercise of such power.

b. There has been no departure from this Court's mandate in No. 76-1640.

This Court has consistently turned aside attempts, based upon insubstantial claims of emergency, to employ the extraordinary writs to consider questions better settled by plenary review. In *Kerr* v. *United States District Court,* 426 U.S. 394 (1976), this Court said:

> "The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. *Will* v. *United States,* 389 U.S. 90, 95 (1967); *Bankers Life & Cas. Co.* v. *Holland,* 346 U.S. 379, 382-385 (1953); *Ex parte Fahey,* 332 U.S. 258, 259 (1947). As we have observed, the writ 'has traditionally been used in the federal courts only "to confine an inferior court to a lawful exercise of its prescribed jurisdic-

> tion or to compel it to exercise its authority when it is its duty to do so."' *Will* v. *United States, supra,* at 95, quoting *Roche* v. *Evaporated Milk Assn.,* 319 U.S. 21, 26 (1943). And, while we have not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of 'jurisdiction,' *Will* v. *United States, supra,* at 95, the fact still remains that 'only exceptional circumstances amounting to a judicial "usurpation of power" will justify the invocation of this extraordinary remedy.' Ibid." (*id.* 402).

Since piecemeal review by mandamus fosters delay and inefficiency and circumvents the Congressional final judgment rule, this Court has cautioned that even for the federal Courts of Appeals a "judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies sought to be furthered by that judgment of Congress." (*id.* 403). *A fortiori,* the policy to conserve the finite judicial resources of this Court, embodied in 28 U.S.C. § 1257(3), requires that any "party seeking issuance of the writ have no other adequate means to attain the relief he desires." *See Kerr* v. *United States District Court, supra* at 403. There will be time enough to consider the question of review in this Court after review has been completed in the state system. This Court held in Ex parte *Fahey,* 332 U.S. 258 (1947), on an original application for mandamus in this Court:

> "These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as substitutes for appeals. As extraordinary remedies, they are reserved for really extraordinary causes." (*id.* 260).

GAC's request in No. 77-1237 for interlocutory review in the guise of a petition for a writ of mandamus to enforce

the mandate in No. 76-1640 seeks to foreclose issues of fact and law never presented to or decided by this Court and not included within its mandate. "The power to compel obedience to the mandate turns on whether the lower court has obstructed enforcement of it . . ." , *United States* v. *United States District Court,* 334 U.S. 258, 265 (1948), which is not the case here. The writ may be employed to make the Court's previous ruling effective, but it does not extend to new issues not decided. *Fisher* v. *Hurst,* 333 U.S. 147 (1948); *United States* v. *Haley,* 371 U.S. 18 (1962); *see also In re Sanford Fork and Tool Co.,* 160 U.S. 247, 255, 256 (1895); *NAACP* v. *Alabama,* 360 U.S. 240 (1959).

Since I&M was not even a party to No. 76-1640, and has no agreement to arbitrate, it cannot be seriously contended that this Court ruled in that case that GAC had a right to a stay of the trial of its dispute with I&M pending arbitration with UNC.

The issues presented in No. 76-1640 concerned the validity of the April 2, 1976 injunction insofar as it prevented GAC from instituting an action in federal court, joining parties to a pending federal action, or asserting claims against other parties to a pending federal action. GAC claimed a concern to avoid an adjudication of its dispute with UNC in a proceeding separate from the utility customers, because of the risk of inconsistent adjudications (Pet. No. 76-1640, 8). GAC now seeks precisely such an adjudication by pressing for arbitration with UNC alone in San Diego. GAC indicated it had no desire to stay the entire trial in Santa Fe; it now seeks that as well. Rather, GAC said that it had acted to join I&M and Detroit in the Santa Fe case to prevent "inconsistent" results and that a decision on the injunction would not advance the termination of the Santa Fe case. Since GAC's alleged need to pursue this litigation with I&M, Detroit (utilities whose contracts contain no arbitration clause) and UNC was "the premise on which the Court disposed of the case", *NAACP*

v. *Alabama, supra,* 360 U.S. at 243, it may not now be repudiated to construct a new version of what was "necessarily decided", *United States* v. *Haley, supra,* 371 U.S. at 19, in that case.

This Court granted certiorari in No. 76-1640 and ruled without further briefing that the injunction was invalid under *Donovan* v. *City of Dallas,* 377 U.S. 408 (1964), stating that the New Mexico Courts could not hamper

> "GAC's desire to *defend itself by impleading UNC* in the federal lawsuits and federal arbitration proceedings brought against it by the utilities. This, of course is something which GAC has every right to *attempt* to do under Fed. Rule Civ. Proc. 14 and the Federal Arbitration Act. The right to *pursue* federal remedies and *take advantage of* federal procedures and defenses in federal actions may no more be restricted by a state court here than in *Donovan.*" 98 S. Ct. at 79 (emphasis supplied; footnotes omitted).

It did not consider complex factual issues of arbitrability or waiver on the abbreviated record before it. The Court stated that it was "impossible, of course, to foresee" all circumstances in which GAC might assert claims in federal proceedings. 98 S. Ct. at 79 n.12. But in so ruling, we submit, this Court did not undertake to decide that all impleader attempts by GAC should be granted, or all asserted arbitration rights should be sustained, any more than it decided that there was merit in the entire range of potential federal claims by GAC which it was "impossible, of course, to foresee." GAC's present effort to obtain review is based upon an injection of elastic qualities into the Court's mandate which it did not contain and could not have anticipated.

GAC is in error when it claims that the decision in No. 76-1640 "rejected" any possible finding that GAC had waived its right to arbitrate (Pet. 1237, 13), or that the issues raised by UNC in opposition to GAC's December 6,

1977 motion for a stay were "substantially the same reasons set out in its prior Brief in Opposition in this Court" (*id.* 9), or that the decisions of December 16 and 27, 1977 "interfere" (*id.* 13) with contractual rights to arbitrate which this Court sustained, or that "the very same grounds that Judge Felter relied upon in reaching his 'Decision(s) of the Court' were before this Court on its consideration of GAC's petition for a writ of certiorari" (*id.* 14), or that the "Court rejected the waiver argument when it remanded the case with specific reference to the arbitration remedy" (*id.* 14), or that "Judge Felter has violated this Court's mandate by sustaining the very same claim that this Court rejected" (*id.* 14), or that continuation of the trial in Santa Fe somehow conflicted with this Court's decision (Pet. 1269, 6), or that the subsequent Rule 37 ruling "brought to fruition Judge Felter's repudiation of this Court's decision" (*id.* 13), or that "the only course proper for Judge Felter upon the issuance of this Court's decision" was to stay "proceedings in his court until there was an opportunity to raise in federal arbitration proceedings and in federal courts the questions which GAC should have been permitted to raise there twenty months earlier" (*id.* 13), since this Court never adjudicated arbitrability, waiver, or any of the other issues considered in the trial court's December 16 and 27 rulings on GAC's motion, and certainly directed no stay of the Santa Fe case. These misapprehensions of counsel do not justify review.

c. There has been no "frustration" of the mandate of this Court.

Nor have subsequent proceedings frustrated this Court's mandate, assuming *arguendo* that the Court may review in No. 77-1237 matters subsequent to the trial court's action on the mandate. *See Fisher* v. *Hurst, supra,* 333 U.S. at 150. Some background is necessary: the injunction reviewed in No. 76-1640 never barred GAC from asserting arbitration

rights—federal or state—before the trial court, as the judge who signed it confirmed in open court (Tr. 4/2/76, 7-8), and as GAC has conceded (Reply No. 76-1640, 7-8). It involved only what was perceived as duplicative assertion of claims "in any other forum" (Pet. No. 76-1640, 3a). Soon after the injunction GAC answered UNC's complaint, demanding arbitration with UNC only if joint arbitration with Duke and Commonwealth were directed, and abjuring any request to arbitrate with UNC under the 1973 Supply Agreement (Reply, No. 76-1460, App. A). The lawsuit went forward. At GAC's instance I&M and Detroit were joined.

Only after the case had been on trial for a month—and seemed to be going badly for GAC— did GAC move for a stay pending arbitration with UNC of the Duke and Commonwealth issues in Charlotte and Chicago and of the same issues under the 1973 Supply Agreement in San Diego. This motion involved matters not within the scope of this Court's mandate. GAC made no claim in its motion that the relief it requested was required by the mandate of this Court. It was the trial court's clear duty, and certainly within its power, to decide whether GAC's assertion of rights under the Federal Arbitration Act against some but not all parties, and as to some but far from all of the issues on trial, required it to stop the trial. GAC's motion called for consideration of whether GAC had any right to compel arbitration by UNC based upon GAC's contracts with Duke or Commonwealth, *John Wiley & Sons, Inc.* v. *Livingston,* 376 U.S. 543 (1964), whether arbitration under the 1973 Supply Agreement had not been waived in GAC's pleadings and by its other inconsistent acts and whether other parties were thereby prejudiced, *Reid Burton Const., Inc.* v. *Carpenters District Council,* 535 F.2d 598 (10 Cir. 1976), *cert. denied,* 429 U.S. 907 (1976); *Cornell &*

Co. v. *Barber & Ross Co.,* 360 F.2d 512 (D.C. Cir. 1966); *In re Tsakalotos Navigation Corp.,* 259 F. Supp. 210 (S.D.N.Y. 1966), whether the antitrust claims and defenses were arbitrable and whether other issues were so closely connected thereto as to make the entire controversy non-arbitrable. *Cobb* v. *Lewis,* 488 F.2d 41 (5 Cir. 1974); *American Safety Equipment Corp.* v. *J. P. Maguire & Co.,* 391 F.2d 821 (2 Cir. 1968); *Aimcee Wholesale Corp.,* v. *Tomar Products, Inc.,* 21 N.Y.2d 621, 237 N.E.2d 223, 289 N.Y.S.2d 968 (1968).

Moreover, it was fully within the trial court's power to stay further action by GAC pursuant to the arbitration demands once it determined that GAC had no right to compel arbitration, and this is true whether the procedures for state-court enforcement of claims under the Federal Arbitration Act derive from state or federal law. *Netherlands Curacao Co., N.V.* v. *Kenton Corp.,* 366 F. Supp. 744 (S.D.N.Y. 1973); *cf. Leesona Corp.* v. *Cotwool Mfg. Corp.,* 315 F.2d 538 (4 Cir. 1963).

All of these issues are raised in GAC's pending appeal. None was foreclosed by this Court's previous ruling. GAC's attempt to pre-empt the pending appeal by pursuing it here as well as in the highest state court should be rejected.

Conclusion

The multiple petitions filed in this Court leave grave doubt as to just what GAC proposes for review should the writs be granted, in view of its many concessions here and below. Indeed, a pervasive vice of the instant petitions is that they nowhere define the scope of the review sought in this Court, as against that readily available on appeal in

the New Mexico courts or now being pursued there. If this Court is to review a sanctions order without considering the factual basis for its entry, and the order staying arbitration only to the extent that it raises questions not already encompassed by the pending appeal, and the November 18 order (so far as not already moot) without regard to the history of contumacy in discovery from which it arose, the suspicion naturally arises that the petitions ask this Court to undertake some sort of topsy-turvy role as the forum in which GAC may pre-empt the state appellate process and seek short-cut review of those questions it does not choose to present in the New Mexico courts on a proper appeal. This seems hardly the role envisioned for this Court by Article III, and it is a role which this Court has carefully avoided and should avoid in this case.

In Nos. 77-1236 and 77-1269 the refusal of the New Mexico Supreme Court to issue an extraordinary writ as to an interlocutory discovery order, undertaking a study of the record and an anticipatory review of the trial court's exercise of discretion, rests upon an independent and adequate state ground and should not be reexamined by this Court, especially where GAC's applications of January 5, 1978 and February 20, 1978 for an extraordinary writ have been rendered moot by succeeding events, and all the matters complained of by GAC, if they remain after trial and judgment, may be raised on appeal. There is no justification for the issuance of a common-law writ of certiorari to review the trial court's interlocutory sanctions order in these circumstances when no emergency exists.

As to No. 77-1237, the mandate of this Court in No. 76-1640 was scrupulously fulfilled; GAC's argument that the mandate foreclosed issues of fact and law which were not before this Court when it issued its mandate should not be

entertained, particularly when such issues are currently being considered by the New Mexico Supreme Court on an appeal based on a full record. None of the traditional grounds for review exists in this case, and the petitions and the motion should be denied.

Respectfully submitted,

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April 17, 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-1236, 77-1237, 77-1269

GENERAL ATOMIC COMPANY,
Petitioner,

v.

THE HONORABLE EDWIN L. FELTER, JUDGE,
Respondent.

On Petitions for Writs of Certiorari to the Supreme Court of New Mexico and on Motion for Leave to File Petition for Writ of Mandamus to the District Court for the First Judicial District, Santa Fe County, New Mexico

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PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

Introduction

The central theme of the responses to GAC's three petitions is a familiar one. This Court is again urged, as it was in 1976, to take no remedial action now. With respect to GAC's petition for mandamus, which seeks long overdue access to federal arbitration, this Court is told that State appellate proceedings are in train. And with respect to the petitions for certiorari, which seek

promptly to set aside local expeditions into the field of foreign affairs, it is said—as it was in 1976—that the New Mexico Supreme Court's rulings rest on non-federal procedural grounds, so that this Court has no power to correct them.

Delay of review by this Court is greatly to the respondents' advantage. Indeed, during the 13½ months between September 14, 1976, when GAC first sought review in this Court of the New Mexico court's injunction against access to federal courts and federal arbitration, and October 31, 1977, when this Court rendered its decision in *General Atomic Co.* v. *Felter*, 434 U.S. 12, UNC benefited substantially from the fact that the invalid judicial decree remained in effect. GAC was forced to conduct and undergo discovery in the State court, to join I & M and Detroit Edison as parties, and to prepare for a trial before a judge who, as this Court ultimately held, had sought improperly to exercise exclusive control over the litigation to GAC's prejudice. And the actions which GAC allegedly took or failed to take during this period of time—while it was objecting to Judge Felter's jurisdictional excesses but was, under pain of contempt, forced to abide by them—ultimately became the foundation for the extraordinary "Discovery Order" issued on November 18, 1977, and the precipitous "Sanctions Order and Default Judgment" of March 2, 1978.

There is, therefore, an issue of law and policy which underlies this case and affects all three of GAC's petitions. That same issue significantly affects the question of timing which the respondents have presented by their various procedural arguments that the case is premature, moot or otherwise beyond this Court's jurisdiction at the present juncture. Should GAC's recourse to federal arbitration outside New Mexico, which has been improperly barred for 25 of the 28 months during which this case has been pending, continue to be denied while the New Mexico Supreme Court (and, possibly, this Court) sort

out the various challenges to the trial judge's summary resolution of litigation over which he had, during all this time, improperly exercised exclusive control? [1]

The arbitration question presented in GAC's Petition for a Writ of Mandamus (No. 77-1237) and the constitutional issues presented in GAC's Petitions for Writs of Certiorari (Nos. 77-1236 and 77-1269) are, in this regard, intertwined. If GAC had been permitted to invoke federal arbitration as early as March 1976, the policy of the Federal Arbitration Act, as reflected in Section 3 of the Act (9 U.S.C. § 3), would have required the New Mexico trial court to stay any further trial proceedings pending the outcome of the federal arbitration. See *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U.S. 449 (1935). The various procedural measures thereafter taken by UNC, including its demand for documents in the custody of a non-party on the newly injected "international cartel" issue, and its efforts to have Judge Felter override the explicit provisions of foreign law, could never have taken place. But because the New Mexico litigation was permitted to proceed for more than one and one-half years as the *only* forum for resolving disputes between GAC and UNC, the New Mexico trial judge was in a position to issue his ruling of November 18, 1977, with regard to the foreign documents.

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[1] There is a ring of familiarity to the respondents' efforts to secure such delay: On November 29, 1976, in reliance upon the assertion made then by UNC that the action of the New Mexico Supreme Court amounted merely to the implementation of a local procedural rule, this Court remanded the case to the State Supreme Court for an express indication of the basis for its decision. *General Atomic Co.* v. *Felter*, 429 U.S. 973 (1976). The effect of that remand was to delay the resolution of the legal issue presented by GAC for more than eleven months, and thereby to force GAC into a position where Judge Felter could say, as he now has, that the parties have been prejudiced by the extensive discovery and by other actions during this period (Pet. 77-1237, p. 7a).

Similarly, his refusal to implement this Court's decision of October 31, 1977, by permitting GAC to proceed to federal arbitration afforded Judge Felter the opportunity to issue his dispositive Sanctions Order and Default Judgment of March 2, 1978. If federal arbitration had proceeded in San Diego, California, in accordance with the demand filed there by GAC on November 29, 1977 (the day following Judge Felter's belated modification of his order), Judge Felter would have been required to stay the trial proceedings in Santa Fe. Judge Felter would not then have been able to continue with the trial to which he had forced GAC, and the decision of March 2, 1978, could never have been issued.[2]

Consequently, if GAC's Petition for Mandamus is granted and it is finally permitted to proceed to federal arbitration, a necessary consequence of that decision would be to invalidate all trial stages that improperly supplanted the arbitration remedy. This result would follow irrespective of the independent constitutional challenge that GAC has made to the orders of November 18, 1977, and March 2, 1978.

---

[2] After the Sanctions Order of March 2, 1978 was entered, UNC asserted that the order had rendered void its contracts with GAC, but Judge Felter said his order did not have that effect. GAC wished to present evidence and argument showing that it would be improper to void the contracts and that the only remedy was damages. Judge Felter repeatedly assured GAC that it would be permitted to present its theory. However, after UNC was given extensive opportunity to present its proof, which consisted entirely of evidence relating to damages, but before GAC was given any opportunity to present *its* proof, including evidence showing that it was improper to void the contracts, Judge Felter declared the contracts void in an order dated April 4, 1978. In this manner, UNC was given an economic benefit worth considerably more than $700,000,000. The order of April 4, 1978 is similar to the ones challenged here in that it would not have been entered if Judge Felter had followed this Court's decision of October 31, 1977 by staying his trial while allowing GAC to proceed to federal arbitration.

I. THE PETITION FOR MANDAMUS

(No. 77-1237)

GAC's position on its right to federal arbitration is simple and straightforward. On October 31, 1977, without requiring full briefs or argument, this Court ruled for GAC in a case in which GAC's Petition for a Writ of Certiorari presented the following question, *inter alia* (Petition, No. 76-1640, p. 4):

> Can a State court in an *in personam* action constitutionally enjoin a defendant from (a) seeking to enforce its rights under the Federal Arbitration Act to require the State court plaintiff to arbitrate or (b) asserting claims against the State court plaintiff in a pending arbitration ordered by a federal court pursuant to said Act?

In its *per curiam* decision, this Court explicitly referred to "federal arbitration proceedings," to the "Federal Arbitration Act" and to the two specific federal arbitrations then pending in Illinois and North Carolina. This Court upheld GAC's right to pursue these and other federal remedies. Notwithstanding this language, the State trial court after remand expressly "stayed" GAC's initiatives in three federal arbitrations, including the Illinois and North Carolina proceedings. This constituted either disobedience or flagrant misunderstanding of this Court's mandate.

Respondents reply, at substantial length, with three arguments:

(1) They contend that mandamus is an improper remedy (UNC Br. in Opp., No. 77-1237, at 10-13; I & M Br. in Opp. at 26-27).

(2) They contend that the grounds relied upon by the trial court for its "stay" were not before this Court when it issued its decision of October 31, 1977 (UNC

Br. in Opp., No. 77-1237, at 13-17; I & M Br. in Opp. at 27-31).

(3) They contend that the trial court's ruling is correct on the merits, and that GAC did, in fact, "waive" its right to federal arbitration (UNC Br. in Opp., No. 77-1237, at 17-23; I & M Br. in Opp. at 31-33).

Each of the arguments is unsound.

1. *Mandamus is appropriate.*—Respondents cite and quote liberally from decisions which describe mandamus as a "drastic and extraordinary remedy" which is to be "sparingly exercised" and limited to "exceptional circumstances." Those cases do not concern, however, a situation in which this Court's mandate has been misapplied or misunderstood by an inferior court. In such a case, the mandamus remedy is the usual means by which the lower court's error is brought to this Court's attention for corrective action.

This Court's ruling of January 23, 1978, in *Vendo Co.* v. *Lektro-Vend Corp.*, 98 S. Ct. 242, was a reminder to counsel of this proper procedural route. In the *Vendo Co.* decision, the Court quoted approvingly from *In re Sanford Fork & Tool Co.*, 160 U.S. 247 (1895), which contains a substantial discussion of the governing rule. It is clear from the many cases cited in the *Sanford Fork & Tool Co.* case (see authorities cited in 160 U.S. at 255-256), as well as from the discussions that followed that case, that the ordinary and preferred avenue for correcting a misapplication of the mandate is by a petition for mandamus. See, *e.g.*, *In re Eastern Cherokee*, 220 U.S. 83, 88-89 (1911) (mandamus should have been instituted earlier); *In re C. & A. Potts & Co.*, 166 U.S. 263 (1897); *Perkins* v. *Fourniquet*, 55 U.S. (14 How.) 328, 330 (1852) ("The question is merely as to the form of proceeding which this court should adopt, to enforce the execution of its own mandate in the court below. The

subject might, without doubt, be brought before us upon motion, and a mandamus issued to compel its execution.")

It is, obviously, desirable that this Court itself resolve questions of construction relating to its own mandate. In the *Sanford Fork & Tool Co.* decision, the Court, speaking unanimously through Mr. Justice Gray, said (160 U.S. at 256; emphasis added):

> The opinion delivered by this court at the time of rendering its decree may be consulted to ascertain what was intended by its mandate; and either upon an application for a writ of mandamus, or upon a new appeal, *it is for this court to construe its own mandate and to act accordingly.*

See also *Gaines* v. *Caldwell*, 148 U.S. 228, 238 (1893):

> But we are of opinion that it is proper for this court, on this application for a writ of mandamus, to construe its own mandate in connection with its opinion; and if it finds that the circuit court has erred, or acted beyond its province, in construing the mandate and opinion, to correct the mistake now and here, and to do so by a writ of mandamus.

Nor is there any merit whatever to the suggestion made in I & M's Brief in Opposition that mandamus will not lie to an inferior State court. *Deen* v. *Hickman*, 358 U.S. 57 (1958), which is cited in GAC's petition, proves that there is no difference between State and federal courts when the issue is whether this Court's mandate has been misapplied. Mandamus is the proper procedure to correct an error in execution. See *Sibbald* v. *United States*, 37 U.S. (12 Pet.) 489 (1838) (mandamus to Superior Court of East Florida to enforce mandate in *United States* v. *Sibbald*, 35 U.S. (10 Pet.) 313 (1836)); *Ex parte Washington & Georgetown R.R. Co.*, 140 U.S. 91 (1891) (mandamus issued to the Supreme Court of the District of Columbia to correct violation of mandate). And *Vendo Co.* v. *Lektro-Vend*

Corp. itself proves that the presence of an appellate court between this Court and the court which is misapplying the mandate is not a bar to mandamus. In that case, a trial court—and not the Court of Appeals for the Seventh Circuit—was proposing to continue a preliminary injunction. This Court did not suggest that the party aggrieved would have to exhaust an appeal to the Seventh Circuit before coming here with a petition for mandamus. It said, rather, that "[i]f petitioner is of the view that the District Court to which the case was remanded is failing to carry out the judgment of this Court," the proper remedy is to proceed under Rule 31 and serve the papers "upon the judge or judges to whom the writ would be directed." 98 S. Ct. at 704.[3]

2. *This Court previously considered and rejected the contention that arbitration had been waived*—In response to GAC's second petition for certiorari, which presented, in the language quoted at p. 5, *supra*, the question of the availability of federal arbitration, UNC asserted that issues relating to rights under the Federal Arbitration Act "were . . . never timely nor properly raised by GAC in the Santa Fe Court . . . ." (UNC Br. in Opp., No. 76-1640, p. 6). The UNC brief went on to state that

[3] Nor is the pendency in the New Mexico Supreme Court of an appeal on the availability of the arbitration remedy a jurisdictional bar to review in this Court by mandamus. This Court may, of course, in the exercise of its discretion, choose to await the decision of the New Mexico court before acting on GAC's petitions. We note, however, that such a course is likely to add substantial delay to that which GAC has already suffered as a result of Judge Felter's invalid injunction. The New Mexico Supreme Court heard oral argument on May 2, and there is no indication of when a decision will be forthcoming. Since this Court's 1977 Term may well end before the New Mexico court rules, and since this Court should not countenance any more delay in this matter, the pendency of the New Mexico action should not be considered, and this Court should act now to enforce its mandate. See *Nebraska Press Ass'n* v. *Stuart*, 423 U.S. 1319, 1327 (1975).

> GAC never once presented to the courts of the State of New Mexico either of the issues raised in Question No. 3 of its Petition (*id.* at p. 6),

that

> GAC never raised either of the issues presented in Question No. 3 of its petition *either before the trial court* or the Supreme Court of New Mexico (*id.* at p. 7; emphasis added),

that

> GAC has never taken any steps to exercise that right [to arbitration] (*id.* at p. 7),

that

> neither the Santa Fe Court nor the Supreme Court of New Mexico ever had the opportunity to consider or pass upon any claims or questions in this case which related in any way to the Federal Arbitration Act (*id.* at pp. 8-9),

and that

> once GAC had failed to properly raise any issue relating to the Federal Arbitration Act before Judge Felter in the Santa Fe Court, *it had waived its right to present that issue on its petition for a writ of prohibition submitted to the Supreme Court of New Mexico* (*id.* at p. 9; emphasis added).

In its Reply, GAC stated unequivocally (Petitioner's Reply, No. 76-1640, p. 6):

> GAC has specifically raised the pernicious effect of the Injunction on its arbitration rights at every stage of the proceedings leading to the Petition.

Footnotes to this section of the Reply Brief specified the pleadings and briefs in which the right to federal arbitration was asserted "at every stage."

Even a cursory glance at the papers filed with this Court in No. 76-1640 refutes the respondents' assertions that the only claims made there related to the institution

of a civil action in a federal court (I&M Br. in Opp., p. 29) or to "the commencement or prosecution of federal court suits" by GAC (UNC Br. in Opp., No. 77-1237, p. 14). Whether or not GAC's right to federal arbitration had been "waived" was squarely put in issue by UNC's lengthy discussion and by GAC's detailed and documented reply.[4] If this Court had agreed, in any respect, with UNC's argument, it would surely have omitted any reference to federal arbitration from its *per curiam* opinion. Instead, the brief opinion explicitly discusses federal arbitration, and footnotes 11 and 12 address not only the two then-pending federal arbitrations, but also contemplate future federal arbitration by GAC of claims against UNC "under the arbitration provision of the 1973 uranium supply agreement," such as that demanded by GAC in San Diego. Hence the availability of federal arbitration, including the kind of proceeding instituted in San Diego, was considered and decided adversely to UNC and could not be re-examined by Judge Felter.

At the very least, this Court held that GAC had the right to seek federal arbitration in forums other than Judge Felter's court. Pursuant to that mandate, GAC sought arbitration through the American Arbitration Association in accordance with its rules and the Federal Arbitration Act. Even if waiver were an open question, it could be decided only by the arbitrator or by a court in the jurisdiction where arbitration was demanded. It was not, under this Court's mandate, an issue which Judge Felter could preserve for his own forum exclusively.

[4] To the extent that UNC now relies, for its waiver contention, on action or inaction by GAC that occurred *after* the submission of briefs to this Court in No. 76-1640, such conduct was attributable to the invalid injunction. And any conduct by GAC which antedated the submission of UNC's Brief in Opposition in No. 76-1640 was, of course, known to UNC and *could have been* cited in support of the general assertions quoted above. Hence UNC's present effort is simply an attempt to relitigate what was once decided here.

We note, in this regard, that the San Diego office of the AAA accepted GAC's demand and ruled on December 12, 1977 (four days before Judge Felter's first improper waiver ruling), that the arbitrator could decide the waiver question. The Illinois arbitrator permitted the filing of GAC's cross-claim against UNC notwithstanding the claim of waiver.

3. *There was plainly no "waiver" of federal arbitration.*—For the foregoing reasons, the question of "waiver" was not open for Judge Felter's evaluation and decision. In any event, however, his ruling was clearly wrong on the merits, for reasons briefly summarized below.

First, the argument that GAC "explicitly" waived arbitration by the language in its eighth affirmative defense (UNC Br. in Opp., No. 77-1237, at 19-20) is specious. By the time GAC's answer was filed, the injunction against federal arbitration had been in full effect for more than one month, and the sole forum, if any, in which arbitration could then be conducted, under the terms of the court order, was Judge Felter's court. GAC had no obligation to give up all its rights under the Federal Arbitration Act to arbitration in a location appropriate under the arbitration clause in exchange for the exceedingly limited option Judge Felter was offering—arbitration in New Mexico under his "supervision" or "jurisdiction" (UNC Br. in Opp., No. 77-1237, Appendix B, pp. 3a-4a). Indeed, the explicit exclusion on which UNC relies covered only "the scope of *this* arbitration demand," and GAC was plainly intending to preserve the right to make *other* arbitration demands in other forums if and when the prohibitory injunction was lifted.

Second, four of the five "actions" by GAC enumerated in UNC's Brief in Opposition as constituting the basis for Judge Felter's conclusion that the right to arbitration had been waived (UNC Br. in Opp., No. 77-1237, at p. 21) took place *after* the injunction forbidding federal

arbitration was entered.[5] Is GAC to be penalized for not violating a court order while it was in effect and for having filed an answer and counterclaim, participated in discovery, moved for summary judgment and proceeded to trial—subject, of course, to earlier objections? Are Judge Felter and UNC seriously suggesting that the only way for GAC to have preserved its right to federal arbitration was to refuse to file an answer, deliberately to omit counterclaims, not to participate in discovery, fail to file motions and refuse to participate in a trial on the merits? Compare *General Guarantee Ins. Co.* v. *New Orleans General Agency*, 427 F.2d 924, 929 (5th Cir. 1970). If GAC had followed any or all of those courses, one may be certain that the claim that a default judgment was justified would have been argued most vigorously (and persuasively) by the respondents. Every single one of these steps was taken by GAC under duress, with all parties and the court being fully aware that it was GAC's position that Judge Felter's court was not the proper forum for this litigation.

Third, the issue decided by Judge Felter—whether or not GAC had delayed excessively in seeking arbitration—is a question that must be left to the arbitrators, not decided by a court. This Court authoritatively held in *International Union of Operating Engineers* v. *Flair Builders, Inc.*, 406 U.S. 487 (1972), that a comprehensive arbitration clause such as the one involved here leaves to arbitrators, not courts, the final determination as to whether a request for arbitration comes too late. Once

[5] Appendix A to this Reply Memorandum is a chart that illustrates the time period covered by Judge Felter's invalid injunction. With respect to UNC's claim that arbitration was waived by "filing two actions against UNC prior to any injunction without demanding arbitration," it should be noted that one of these actions was a lawsuit by Gulf Oil Corporation, and not GAC, and that it concerned a different contract. The other was an interpleader action in which the right to arbitrate was expressly reserved if interpleader jurisdiction was not sustained—which turned out to be the case.

the court has found that "the parties are subject to an agreement to arbitrate" (406 U.S. at 491)—which is not in issue here[6]—claims that arbitration has been unduly delayed must be submitted to the arbitrators. *See, e.g.*, *Halcon International, Inc.* v. *Monsanto Australia, Ltd.*, 446 F.2d 156 (7th Cir.), *cert. denied*, 404 U.S. 949 (1971). Additionally, there is a strong federal policy favoring arbitration, and waiver is not to be lightly inferred. *Carcich* v. *Rederi A/B Nordie*, 389 F.2d 692, 696 (2d Cir. 1968); *Gavlik Construction Co.* v. *H. F. Campbell Co.*, 526 F.2d 777, 783 (3d Cir. 1975).

Fourth, the court ignored the plain agreement of the parties that participation in judicial proceedings would not be deemed a waiver of the right to arbitrate. The parties had agreed that the Rules of the American Arbitration Association would be applicable, and Rule 46(a) of those Rules states:

> No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

In addition, Rule 52 provides that any doubt as to the meaning of a Rule is to be resolved by the arbitrator or the AAA:

> The arbitrator shall interpret and apply these rules insofar as they relate to his powers and duties . . . All other Rules shall be interpreted and applied by the AAA.

Finally, there is no merit to the argument, made in a footnote in UNC's Brief in Opposition (pp. 21-22, n. 25)

[6] Although I&M was not a party to an arbitration clause with GAC, its disagreement with GAC depends in large part on the outcome of the GAC-UNC difference, which is subject to arbitration. If GAC prevails in its federal arbitration with UNC, it will be able to provide uranium to I&M, and the principal dispute will, therefore, become moot. Any dispute remaining between GAC and I&M after arbitration would be subject to federal-court jurisdiction on account of diversity of citizenship.

and asserted in Judge Felter's decision (GAC petition, No. 77-1237, pp. 14a-19a), that arbitration should be denied because New Mexico antitrust issues are "inextricably intertwined" with other questions in the case. No federal antitrust issues are present in this case because UNC has deliberately refrained from raising any federal questions to avoid the dispassionate surroundings of a federal forum.[7] UNC's argument that the State antitrust claims are not arbitrable is erroneous. Where only questions of State law and policy are present the Supremacy Clause of the United States Constitution prevents them from defeating the overriding federal policies of the Federal Arbitration Act. See *Free* v. *Bland*, 369 U.S. 663 (1963); *United States* v. *Georgia Public Serv. Comm'n*, 371 U.S. 285 (1963); *Connell Construction Co.* v. *Plumbers and Steamfitters Local No. 100*, 421 U.S. 616 (1075). This Court has said that the "unmistakably clear congressional purpose" of the federal law is that the arbitration procedure "be speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). This

[7] This case is a classic instance in which the interests of a local business enterprise coincide with the State's substantial economic interests. UNC has sought, in arguments to the New Mexico courts, to demonstrate that a ruling in its favor would help the local economy. For example, UNC's motion to the New Mexico Court of Appeals for certification of the pending appeal to the New Mexico Supreme Court (Pet. No. 77-1237, App. I, pp. 32a-35a), urged that the outcome of the case "will effect [*sic*] the entire economy of the State, the tax revenues of the State, and the conservation of New Mexico's irreplaceable material resources." The local press has not been oblivious of the economic realities. An editorial in the *Santa Fe New Mexican* on the date trial began (October 31, 1977) asserted that "[a]ll New Mexico residents have a direct stake in the outcome of a multi-billion dollar uranium lawsuit which will be heard here in District Court beginning today." The editorial went on to observe that if UNC is able to sell its uranium at a price in excess of $40 a pound—instead of the $6 to $10 a pound figure provided in its contract with GAC—"the state stands to gain huge severance tax windfall" under a new tax law. A copy of the full editorial appears as Appendix B, p. ——, *infra*.

policy would be vitiated by resort to "state law which shifts the determination of disputes from arbitrators to courts." *Commonwealth Edison Co.* v. *Gulf Oil Corp.*, 541 F.2d 1263, 1269 (7th Cir. 1976).

Moreover, if any court is to carve out a portion of these claims that are not subject to arbitration, it should be the court that has jurisdiction under the Arbitration Act to supervise the arbitration. The site of any arbitration would be San Diego, California, where GAC has filed the required notice, and any question of "intertwinement" should, therefore, be presented to the supervising court in that jurisdiction and resolved by it.

II. THE PETITIONS FOR CERTIORARI

(Nos. 77-1236 and 77-1269)

As we have previously noted (pp. 3-4, *supra*), the issues presented in GAC's petitions for certiorari may become moot if Judge Felter is ordered to vacate his order staying the federal arbitrations and is required to restore the parties to the *status quo ante*—*i.e.*, to the positions they would have occupied if arbitration had not been erroneously enjoined in March and April 1976 and again in December 1977. Even if the petitions for certiorari were entirely dependent upon GAC's companion petition for mandamus, it would be appropriate for this reason to hold the petitions for certiorari until the petition for mandamus is decided, and then to act upon the applications for certiorari in light of the mandamus disposition.

There are, however, independent grounds supporting GAC's petitions for certiorari, and these grounds are not answered by the arguments made in the Briefs in Opposition. Indeed, the respondents' papers appear designed to divert attention from the substantive constitutional issues presented and focus instead on alleged procedural grounds

that are said to insulate the orders from review by this Court.

1. *The November 18 order has not been "superseded."* —One refrain that is repeated in the Briefs in Opposition is the assertion that the "discovery order" of November 18 no longer presents any viable question because it has been "superseded" and rendered moot by the "Sanctions Order and Default Judgment" of March 2, 1978.[8]

As we attemped to make clear in the petition in No. 77-1269 (p. 12), review of Judge Felter's Sanctions Order and Default Judgment, as amended, is not sought in this Court at this time, except to the very limited extent set forth in the petition—*i.e.*, to the extent that it carries into effect the November 18 discovery order. Consequently, the respondents' emphasis upon the "bad faith" findings in Judge Felter's Sanctions Order is entirely beside the point. Although we will not, in this document, burden the Court with a lengthy factual rebuttal to the unwarranted findings of general bad faith in the discovery process, GAC should not be misunderstood as acquiescing in these facts, or in the general conclusion, in any way. Suffice it to say that discovery relevant to this action was promptly provided by GAC. By September 1976, for example, just nine months after this action commenced, GAC had provided UNC's counsel with access to approximately six million pages of documents in GAC's files, of which UNC copied over two hundred thousand. A full factual response to the allegations of bad faith is contained in two briefs, totalling 180 pages, which were filed with the trial judge (and, of

[8] This "supersession" claim is advanced no less than four times in UNC's brief. UNC Br. in Opp., pp. 2, 4, 17, 21. The mootness argument appears in the I & M Br. in Opp., p. 15. I & M initially hedged its position that the order was moot, saying that it was so "except to the extent . . . reflected in the March 2, 1978" sanctions order, as amended. It seems to have withdrawn even this qualification in its Supplemental Brief (I & M Supp. Br., p. 2).

course, served on respondents), and which we are lodging with the Clerk for examination by this Court if further detail is deemed useful.

It is clear, in any event, that the Sanctions Order does in effect carry into execution the earlier discovery order. This appears not only from the text of the Sanctions Order itself (Recital 46, UNC Br. in Opp., Nos. 77-1236 and 77-1269, p. 17a), but even more vividly from its procedural evolution. The November 18 order laid the groundwork for the adoption of conclusive findings against GAC (Pet. No. 77-1236, App. B, pp. 2a-5a). The order of December 27, 1977, refused to vacate the earlier order and reaffirmed it (Pet. No. 77-1236, App. L, pp. 44a-46a). The order of January 25, 1978, reaffirmed once again the November 18 order as "of full force and virtue" (Pet. No. 77-1269, App. E, pp. 33a-35a). And finally came the Sanctions Order itself.

In view of this history and of the express terms of the Sanctions Order, it is difficult to see how UNC and I & M can contend that the November 18 order has been "superseded" or is "moot." If it was invalid when issued and should have been corrected by writ of prohibition at that time, it is equally invalid now. The only difference is that the November 18 order has now been placed in sharper focus with the issuance of another order specifying the sanctions imposed and enunciating the findings of fact contemplated by the original order.

2. *The orders unconstitutionally impede the conduct of foreign policy.*—The extent to which foreign policy has been affected by Judge Felter's orders of November 18, 1977, and March 2, 1978, is demonstrated by the extraordinary action taken by the Government of Canada in sending a Diplomatic Note to this Court and filing an *amicus* brief here. The respondents, in their Supplemental Briefs, take issue with the Canadian Government's interpretation of Judge Felter's orders. Although

both orders rely heavily on GAC's failure to provide "cartel documents" of a non-party located in Canada in response to interrogatories, and the *amicus* brief of the Canadian Government unequivocally represents to this Court that compliance by that non-party with *either* production *or* identification of these documents would violate Canadian law which carries "substantial criminal penalties" (Canada Br., pp. 3-4), the respondents persist in challenging the proposition that such an order interferes with foreign policy. Indeed, the respondents' own briefs highlight the very error that infected Judge Felter's proceedings and that has, apparently, angered the Government of Canada. The brief submitted by the Government of Canada noted that Judge Felter had "magnified the impact" of his erroneous ruling "by disputing the Canadian Government's interpretation of its own Regulations, and by questioning the authority of the Minister of Energy, Mines and Resources to address issues regarding the Regulations . . . ." (Canada Br., p. 11.) The respondents' briefs aggravate the situation even further by continuing to question whether Canadian law forbids identification of the documents, by continuing to question whether Canadian ministers have authority to construe Canadian law (I&M Supp. Br., at 4-5), and by claiming that the formal Diplomatic Note submitted by Canada should be read—contrary to its plain and obvious meaning—as permitting identification of documents (UNC Supp. Br., at 5).

Moreover, the respondents cannot contest the Canadian Government's representation to this Court that Judge Felter made an "unwarranted determination regarding Canadian Government activity and decisions, which were taken at the highest governmental level . . ."—precisely the kind of judgment that the act-of-state doctrine is designed to prohibit—and that the effect of the default judgment is to "encourage Canadian nationals and resi-

dents to violate Canadian law in the future . . ." (Canada Br., at 11-12).

In addition, the subject of Judge Felter's findings and order is one that is now being discussed, on a government-to-government basis, between the appropriate foreign ministries of the two countries (Canada Br., pp. 10-11). How to accommodate the apparently conflicting interests of the United States antitrust laws as they apply to international trade and the sovereign interests of Canada, as manifested in its uranium marketing and uranium security regulations, should be left to international agreement between the governments. It is unfair to squeeze private parties caught between these conflicting interests and it is surely inappropriate, as the Canadian Government has noted, for a State court to "intrude on these intergovernmental consultative processes" (Canada Br., p. 11).

It is clear that issues relating to the serious international economic conflict which has arisen over the marketing of uranium, issues which are currently under negotiation between the Governments of Canada and the United States, cannot properly be resolved by a discovery order or default judgment, which is the way Judge Felter has chosen to resolve them. If these issues are even appropriate for judicial resolution, such resolution must occur on the basis of a full presentation of evidence. Common sense, the magnitude of the international and financial stakes, and the minimal requirements of international comity demand no less.

3. *There is no independent and adequate nonfederal ground.*—Notwithstanding the severity of the impact on foreign relations, the respondents argue that, for State procedural reasons, the New Mexico Supreme Court was simply deferring resolution of the issues until there was a formal judgment. GAC's petitions clearly indicate, however, that our challenge to Judge Felter's orders of November 18, 1977, and March 2, 1978, relate to the

jurisdiction of his court, and that is why the only correct means of curing his error was to issue a writ of prohibition.

The New Mexico Supreme Court has held, in a long line of cases cited in *State ex rel. Transcontinental Bus Serv., Inc.* v. *Carmody*, 53 N.M. 367, 370, 208 P.2d 1073, 1075 (1949), that a writ of prohibition will issue as a matter of right where an inferior court acts outside or in excess of its jurisdiction. Whether denial of the writ occurs summarily upon filing of an application, as it did here, or after issuance of an alternative writ later discharged as improvidently granted, does not affect the fundamental question whether the trial court is exceeding its jurisdiction. The New Mexico Supreme Court necessarily concluded that Judge Felter was not so acting in the instant case, and that conclusion is reviewable here under the authorities cited in GAC's petitions (No. 77-1236, pp. 2, 16; No. 77-1269, p. 2).

Moreover, in light of the nature of the claim—*i.e.*, that such local orders do immediate harm to the entire nation's foreign policy—immediate appellate relief is a necessary part of the claimed right. The injury done to foreign relations by the entry of a State court order which cavalierly impugns the validity of the considered formal policy of a friendly foreign government and threatens (as well as imposes) sanctions for refusal to commit criminal acts in such a foreign country is so substantial that a State's appellate court cannot be permitted to treat such an order as one that is reviewable only in the "regular appellate process" and that must, therefore, await a final judgment and full briefing and oral argument from such a judgment. In the field of foreign relations—just as is true in the area of First Amendment freedoms (compare *Freedman* v. *Maryland*, 380 U.S. 51, 57-60 (1965))—prompt judicial action is an intrinsic part of the protection that must be afforded by

law. The usual appellate processes applicable to civil actions in State courts cannot govern rulings of a trial court that jeopardize foreign policy interests. Otherwise, the judicial system becomes helpless to deal with interlocutory orders that plainly exceed a trial judge's jurisdiction but raise serious foreign policy considerations.

CONCLUSION

For the foregoing reasons, the requested writ of mandamus to require Judge Felter to permit federal arbitration should be granted. GAC's Petitions for Writs of Certiorari should be granted, and the orders of November 18, 1977, and March 2, 1978, should be vacated, either as ancillary relief to the granting of the writ of mandamus or on the constitutional grounds set forth in GAC's Petitions for Writs of Certiorari.

Respectfully submitted,

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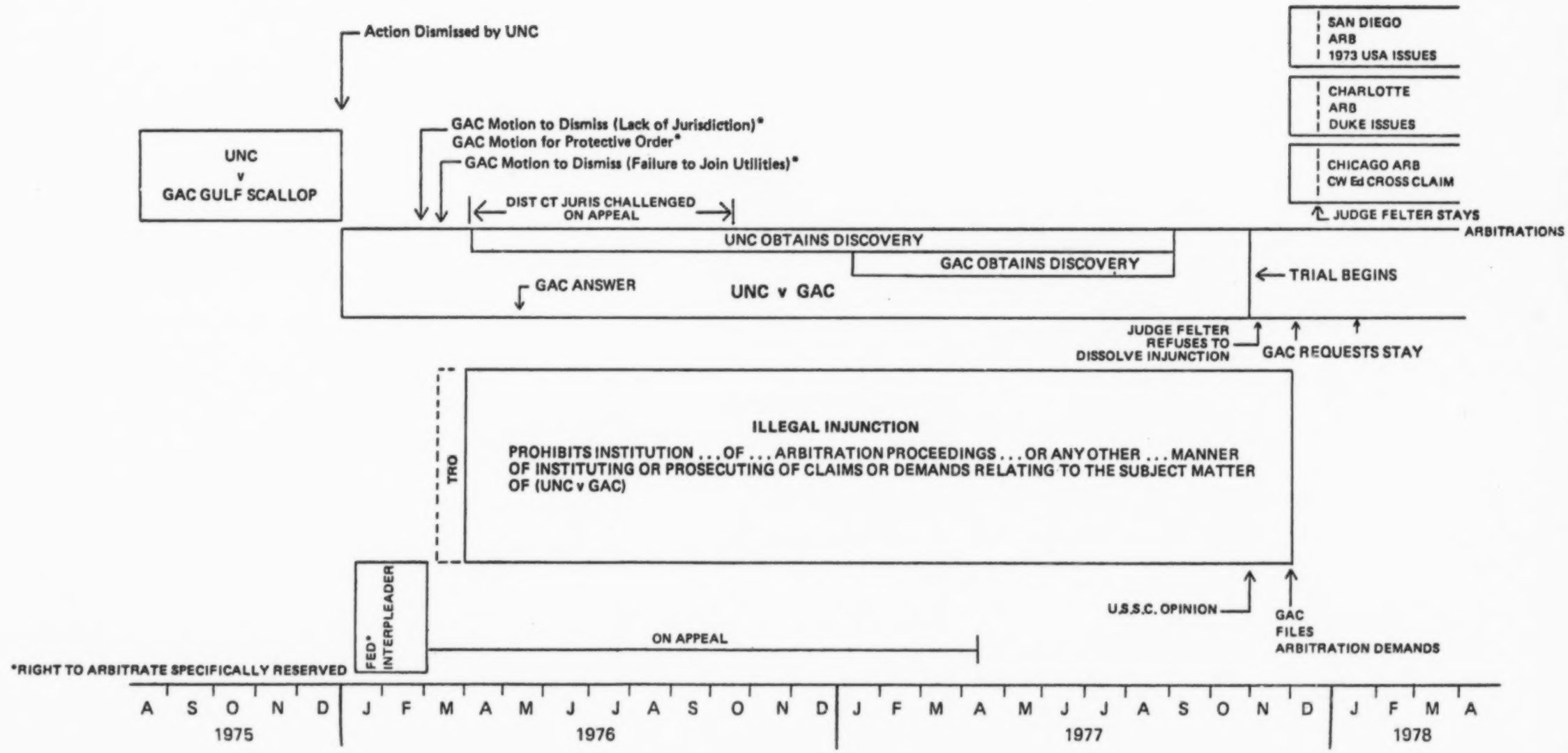
APPENDICES

APPENDIX A

LITIGATION AND ARBITRATION RELATING TO 1973 URANIUM SUPPLY AGREEMENT



APPENDIX B

THE NEW MEXICAN
Santa Fe, N.M. Mon., Oct. 31, 1977

NM's STAKE IN SUIT

All New Mexico residents have a direct stake in the outcome of a multi-billion dollar uranium lawsuit which will be heard here in District Court beginning today.

Many motions and much testimony were heard by Dist. Judge Edwin Felter last week in preparation for the trial which is to determine the fate of a lawsuit brought by United Nuclear Corp. against General Atomic Co., a subsidiary owned in part by Gulf Oil Corp.

At stake is the fate of 27 million pounds of New Mexico uranium scheduled for delivery to General Atomic customers over the next five to 15 years.

United Nuclear is alleging fraud and coercion by Gulf when it was induced to sign two long-term contracts to supply uranium at prices far below the present market price.

Under the contracts United Nuclear is required to provide the 27 million pounds of uranium at prices ranging from $6 to $10 a pound, while the present market price of uranium has soared to more than $40 a pound.

In its $2.2 billion suit United Nuclear alleges that Gulf Oil, through its participation in a uranium cartel with the Canadian government, was able to hold uranium prices artificially low and to coerce the firm into signing long-term contracts at these low prices.

United Nuclear contends it would endure severe economic hardship if it is forced to deliver uranium at prices far below the present market price.

Meanwhile, Gulf, protesting its innocence and claiming was required to participate in the uranium cartel by order of the Canadian government, has filed a $1.3 billion countersuit against United Nuclear claiming that it has conspired to raise uranium prices and to restrain trade.

New Mexicans will be affected by this case because could determine whether the 27 million pounds of uranium sells for between $6 and $10 a pound or $40 a pound. Since the legislature enacted new, larger severance taxes on uranium, which are pegged to the selling price of milled uranium, the state stands to gain huge severance tax windfall, if the higher price is imposed.

The case, involving batteries of lawyers on both sides, tens of thousands of exhibits and hundreds of thousands of pages of testimony is probably one of the largest suits of its kind in history.

At issue are complicated principles and questions involving uranium production and marketing which the average layman could never hope to understand. The outcome, however, will have considerable long-term impact on the state's finances and its taxpayers.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-1236, 77-1269

GENERAL ATOMIC COMPANY, *Petitioner,*

v.

THE HONORABLE EDWIN L. FELTER, JUDGE, *Respondent.*

BRIEF OF THE GOVERNMENT OF CANADA AS AMICUS CURIAE

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v.

THE HONORABLE EDWIN L. FELTER, JUDGE, *Respondent.*

BRIEF OF THE GOVERNMENT OF CANADA AS AMICUS CURIAE

The Government of Canada hereby appears as amicus curiae, and files this brief with the consent of all parties. The pending petitions for a writ of certiorari (Nos. 77-1236 and 77-1269) seek review of two Orders of the Supreme Court of New Mexico that denied the applications of petitioner General Atomic Company ("GAC") for Original Mandamus and Prohibition, thereby continuing in effect a discovery order calling for GAC to produce documents located in Canada, pro-

duction of which is prohibited by Canadian law; and the consequent entry of a Sanctions Order and Default Judgment by the District Court for the First Judicial District of Santa Fe County, New Mexico, because of GAC's failure to produce.[1] The Government of Canada respectfully submits that the state courts have contravened established principles of international comity and of United States law which require deference to the laws and national policies of Canada, and urges this Court to review the actions below.

THE INTEREST OF CANADA

1. Pertinent Canadian Law and Policy

On September 23, 1976, Canada promulgated the Uranium Information Security Regulations which, as amended, provide in pertinent part:[2]

[1] Petition No. 77-1236, filed March 3, 1978, prays that a writ of certiorari issue to review the New Mexico Supreme Court's January 11, 1978 decision denying GAC's application for a writ of prohibition. Petition No. 77-1269, filed March 15, 1978, prays that a writ of certiorari issue to review both the New Mexico Supreme Court's March 2, 1978 decision denying GAC's application for Original Mandamus and Prohibition, and the New Mexico District Court's Sanctions Order and Default Judgment that was entered on the same day. The Government of Canada takes no position on the merits of the case.

[2] P.C. 1976-2368, amended by P.C. 1977-2923 as of October 13, 1977. The background of these Regulations and their nexus with the international uranium marketing arrangement are described in the Canadian Government documents included in the Appendices attached to the Petition for Writ of Certiorari, No. 77-1236, particularly in the statements of the Minister of Energy, Mines and Resources set forth at 13a-24a. Hereinafter citations to the Appendix to Petition No. 77-1236 shall be styled "Pet. 1 App. —," and citations to the Appendix to Petition No. 77-1269 shall be styled "Pet. 2 App. —."

> 3. No person who has in his possession or under his control any note, document or other written or printed material in any way related to conversations, discussions or meetings that took place between January 1, 1972 and December 31, 1975 involving that person or any other person in relation to the exporting from Canada or marketing for use outside of Canada of uranium or its derivatives or compounds, shall (a) release any such note, document or material, or disclose or communicate the contents thereof . . . unless . . . (ii) he does so with the consent of the Minister of Energy, Mines and Resources.[3]

It has been the continuing and oft-stated policy of the Canadian government since September 23, 1976 to enforce these Regulations. Substantial criminal penalties are provided for violation of the Regulations. Atomic Energy Control Act, R.S.C. 1970, c. A-19, Section 19(1).

2. The State Courts' Refusal to Respect Canadian Law and Policy

On October 19, 1977, Alastair Gillespie, the Canadian Minister of Energy, Mines and Resources, responded to a GAC request for a waiver of the terms of the Regulations by stating (a) that waiver of the Regulations in order to permit production of documents would be contrary to the policy of the Government of Canada and would not be granted, and (b) that he had been advised that the requested identification of documents

[3] While the Regulations provide for waiver of the prohibition by the Minister, the High Court of Ontario on Nov. 10, 1977, in *Joe Clark, et al.* v. *Attorney General of Canada* (unreported), struck down the authority of the Minister to grant such dispensations. Since that time no Canadian official has had the authority to waive the terms of the Regulations.

located in Canada would contravene the Regulations.[4] Mr. Gillespie's letter was furnished to the trial court by GAC counsel. Nonetheless, on November 18, 1977, the court entered an order which included the following provisions:

> 1. Defendant, General Atomic Company, forthwith shall identify, clearly and definitively, all documents housed in Canada which are the subject of said motion.
>
> 2. All facts provable from documents housed in Canada which are not produced and which are the subject of said motion are found against Defendant, General Atomic Company, and said defendant is precluded from offering evidence herein in opposition to such findings of fact . . . .

In justification of this order, the court observed:

> Deference to the sovereignty and national interest of Canada or its provinces cannot be accomplished through sacrifice of the sovereignty of New Mexico and of due process of law and equal application and protection of law afforded by the laws of New Mexico. In this forum, the aforesaid laws of this forum which protect the fundamental public policy of this State must govern over the national

[4] Pet. 1 App. at 37a-38a. The trial court did not accept the interpretation placed upon the Canadian Regulations by Minister Gillespie, that the Regulations prohibited the identification of documents (compare Pet. 1 App. at 37a-38a, 42a-43a and 44a-46a). However, no effort was made to pursue remedies in Canada and to obtain a more formal or binding opinion from Canadian authorities as by issuance of letters rogatory to a Canadian court. *See Ings* v. *Ferguson*, 282 F.2d 149 (2d Cir. 1960) (proper procedure is by letters rogatory). In a diplomatic note which was delivered to this Court on March 15, 1978, the Government of Canada confirmed that it interprets the Regulations as prohibiting the identification of documents which involves drawing upon the information in the documents.

> interest or policy of a foreign country as legislated and conceived by that foreign country. No rule of comity would require a sovereign state of the United States to so abdicate the protection of fundamental rights under its general laws that are necessary to a fair trial in favor of special foreign laws that are not concerned with any aspect or requirement of fair trial.[5]

On December 6, 1977, Mr. Gillespie responded to a further GAC request for a dispensation by stating that, because of an intervening court decision, he no longer possessed the authority to grant a waiver of the Regulations.[6] Three days later, Mr. Gillespie advised Gulf Minerals Canada Limited ("GMCL"), the Gulf subsidiary located in Canada that would have had possession of the documents in dispute, that ". . . the Regulations effectively prohibit Gulf Minerals Canada Limited from assisting General Atomic Company in complying with the District Court in New Mexico, by producing, or identifying, documents coming within the provisions of the Regulations."[7] On the same day, the Government of Canada sent a diplomatic note to the Department of State indicating that Canadian law prohibited identification or production of documents covered by the Regulations, and expressing a deep concern that the trial court had acted in a manner inconsistent with international comity by ordering GAC to contravene Canadian law by causing the identification

[5] Pet. 1 App. 3a-4a. The court's order further invited plaintiff United Nuclear Corp. to "file and serve proposed findings of fact on the factual issues to be determined against Defendant, General Atomic Company, by reason of the non-production . . ." (Pet. 1 App. at 4a).

[6] Pet. 1 App. at 41a.

[7] Pet. 1 App. at 42a-43a.

and production of documents located in Canada.[8] On December 20, 1977, the Department of State transmitted this diplomatic note to the trial court.[9]

On December 27, 1977, the trial court refused to vacate its November 18 order.[10] In an opinion of that date, the court reasoned that, even if Canadian law did prohibit GMCL from producing and identifying documents and this prohibition occasioned GAC's inability to comply with discovery orders, it was nonetheless appropriate to impose sanctions upon GAC. On January 11, 1978 and March 2, 1978, the New Mexico Supreme Court denied GAC's applications for writs of Mandamus and Prohibition. Thereupon, the trial court, acting on the basis of GAC's failure to comply with its discovery orders, imposed sanctions upon GAC by finding facts adverse to GAC on matters which might have been covered by documents located in Canada, and by entering a default judgment against GAC.[11]

DISCUSSION

The Government of Canada respectfully submits that the New Mexico courts have violated well-established principles of international comity, which are recognized by United States law. *E.g., Application of Chase Manhattan Bank,* 297 F.2d 611, 613 (2d Cir. 1962); *cf. Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 423 (1964) (international law principles as part of American law). United States courts have, on

[8] Pet. 1 App. at 11a-12a.

[9] Pet. 1 App. at 8a.

[10] Pet. 1 App. at 44a-46a.

[11] Pet. 2 App. 2a-25a.

the grounds of comity, refused to compel the production of documents located in a foreign state where such production was prohibited by the criminal law of the foreign sovereign, as in this case. *Application of Chase Manhattan Bank,* 297 F.2d 611, 613 (2d Cir. 1962) (law of Panama); *see Federal Maritime Commision* v. *De Smedt,* 268 F.Supp. 972, 974, 975 (S.D.N.Y. 1967) (law of Great Britain and India); *see also Ings* v. *Ferguson,* 283 F.2d 149, 152, 153 (2d Cir. 1960) (law of Canada); *First National City Bank of N.Y.* v. *Internal Revenue Service,* 271 F.2d 616, 619 (2d Cir. 1959), *cert. denied,* 361 U.S. 948 (1960) (law of Panama).[12] Thus, in *Ings* v. *Ferguson,* the Second Circuit stated:

> Upon fundamental principles of international comity, our courts dedicated to the enforcement of our laws should not take such action as may cause a violation of the laws of a friendly neighbor or, at the least, an unnecessary circumvention of its procedures. Whether removal of records from Canada is prohibited is a question of Canadian law and is best resolved by Canadian courts. [Citations omitted]. . . . If upon such proceedings,

[12] In some cases, courts have exercised jurisdiction and issued orders directing production of foreign documents in order to facilitate a clarification of foreign law, or to provide an opportunity for a party to request a waiver of that law. See, *e.g., Societe Internationale* v. *Rogers,* 357 U.S. 197, 205, 206 (1958); *First National City Bank of N.Y.* v. *Internal Revenue Service,* 271 F.2d 616 (2d Cir. 1959), *cert. denied,* 361 U.S. 948 (1960). However, once the foreign sovereign has made clear that its criminal laws prohibit compliance and that it will not waive those laws, this justification evaporates and enforcement of production has not been judicially pursued. See, *e.g., Ings* v. *Ferguson,* 282 F.2d 149, 152, 158 (2d Cir. 1960); *First National City Bank of N.Y.* v. *Internal Revenue Service,* 271 F.2d 616 at 619. Mr. Gillespie's letter of October 19, 1978 removed any justification for the trial court's further exercise of its enforcement jurisdiction, and the court's subsequent efforts to enforce its discovery orders constituted a failure to recognize Canadian sovereignty.

> i.e., letters rogatory . . . . production were declared illegal, the motion to quash should be granted . . . because the exception of illegality under foreign law would have been met. [282 F.2d at 152, 153]

The Uranium Information Security Regulations constitute a legal barrier to the production or identification of documents which should have been respected by the state courts. Indeed, it is the very barrier to which the Tenth Circuit deferred in *In Re Westinghouse Electric Corp. Uranium Contracts Litigation,* 563 F.2d 992 (10th Cir. 1977). In that case, the Court of Appeals reversed an order of contempt and sanctions for noncompliance with a subpoena on the grounds that compliance was barred by the Uranium Information Security Regulations.

It is noteworthy that Canadian law addressing this issue mirrors American authorities. Recently, the Ontario Court of Appeal reversed a trial court's order directing a third party to contravene Panamanian law and provide certain information. *Frischke* v. *Royal Bank of Canada,* 1977 17 O.R.2d 388 (Ontario C.A). In reversing, the court cited analogous United States cases and declared:

> An Ontario court would not order a person here to break our laws; we should not make an order that would require someone to compel another person in that person's jurisdiction to break the laws of that State. We respect those laws .The principle is well recognized. [17 O.R.2d at 399] [13]

[13] The court cited *United States* v. *First National City Bank,* 396 F.2d 897 (2d Cir. 1968) and *Application of Chase Manhattan Bank,* 297 F.2d 611 (2d Cir. 1962). It observed that Canadian courts would defer to foreign law except in ". . . cases of very special circumstances." 17 O.R.2d at 399.

Thus, the decisions of American and Canadian tribunals hold that a court should not direct the production of documents located in a foreign country in situations where the criminal law of that foreign country prohibits such production. The primary rationale for this rule is that, notwithstanding the desire of a litigant to obtain certain information, a discovery order in these circumstances would lead to an unacceptable conflict with foreign law and intrude upon foreign sovereignty. The New Mexico trial court's error flowed from its failure to recognize this principle of comity, and from its contrary and incorrect assumption that the needs of litigation in New Mexico "must govern" and outweigh any interest of Canada or any deference to the law of Canada. See p. 5 *supra.*

In fact, deference to foreign law is required in this case by two factual circumstances, (a) that the documents sought are located in Canada, and (b) that the law of Canada prohibits the production or identification of documents, subject to criminal sanctions.[14] Under the principles of comity and the above-cited authorities, these factors are dispositive; it is impermissible to enforce compliance in the face of the unequivocal Canadian prohibition applicable to conduct and documents in Canada.[15] Furthermore, other facts in the present setting buttress the conclusion that the trial court acted improperly:[16]

[14] This was made clear by Mr. Gillespie's letter of October 19, 1978. See pp. 3-4 *supra.*

[15] Cases cited at 6-8 *supra.*

[16] The scope of relevant considerations is indicated by § 40 of the Restatement of Foreign Relations Law (Second), which sets forth the criteria governing application of the principles of comity and fairness when there are conflicting rules. The Restatement cites

(a) Canada is a friendly government.[17]

(b) The Uranium Information Security Regulations are expressive of a vital Canadian national interest.[18] The importance that the Canadian Government attaches to enforcement of these Regulations has been underscored by its protests to the exercise of enforcement jurisdiction.[19]

(c) A private party's effort to obtain discovery in a case involving New Mexico law does not involve vital national interests of the United States.[20]

(d) The Canadian and American governments have been engaged in consultations exploring means of eliminating the potential conflict between

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such factors as: "(a) vital national interests of each of the states, (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person, (c) the extent to which the required conduct is to take place in the territory of the other state, (d) the nationality of the person, and (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state." Factors "(c)" and "(d)" are paramount and dispositive here, as noted above; the others support the position of the Government of Canada.

[17] *Ings* v. *Ferguson*, 282 F.2d 149 (2d Cir. 1960) (Canada is a friendly neighbor).

[18] *In Re Westinghouse Electric Corp. Uranium Contracts Litigation*, 563 F.2d 992, 998 (10th Cir. 1977) (Uranium Regulations serve a legitimate "national purpose"). *See generally* Pet. 1 App. at 13a-21a.

[19] *See In Re Grand Jury Investigation of the Shipping Industry*, 186 F. Supp. 298, 318 (D.D.C. 1960) (foreign governmental protests caused court to delay production); *cf. Arthur Andersen and Co.* v. *Finesilver*, 546 F.2d 338 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977) (lack of foreign protest cited as contributing to subpoena enforcement).

[20] *See In Re Westinghouse Electric Corp. Uranium Contracts Litigation*, 563 F.2d 992, 999 (10th Cir. 1977).

> the application of the United States antitrust laws to international trade, specifically including the U.S. Department of Justice's pending grand jury investigation of the uranium industry, and Canadian sovereign interests, specifically including the regulation of Canadian uranium marketing and the Uranium Information Security Regulations. The decisions of the New Mexico courts improperly intrude on these intergovernmental consultative processes.[21]

These factors emphasize the error of the court's decision to disregard comity and exercise its enforcement jurisdiction.

The trial court magnified the impact of its error by the manner in which it chose to exercise its enforcement jurisdiction. First, by disputing the Canadian Government's interpretation of its own Regulations, and by questioning the authority of the Minister of Energy, Mines and Resources to address issues regarding the Regulations,[22] the court conducted itself in a way calculated to enter into conflict with the interests of the Government of Canada. Second, by using GAC's non-compliance as the basis for its fact findings, the court in effect used Canada's proper enforcement of its Information Regulations to reach unwarranted determinations regarding Canadian Government activity and decisions, which were taken at the highest governmental level, in respect of the marketing and exporting of Canadian uranium. Third, by entering a default

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[21] *See Federal Maritime Commission* v. *De Smedt*, 268 F. Supp. 972, 974, 975 (S.D.N.Y. 1967) (conflict a matter for diplomatic negotiation); *cf. American Industrial Contracting, Inc.* v. *Johns-Manville Corp.*, 326 F. Supp. 879 (W.D. Pa. 1971) (no international relations problem).

[22] Pet. 2 App. at 14a.

judgment and exposing a party to substantial damages, the court's decision poses a continuing problem to international relations in that it will encourage Canadian nationals and residents to violate Canadian law in the future in order to avoid the severe consequences of non-compliance with U.S. judicial processes.

Although this brief has focused on considerations of comity which directly affect the Canadian Government, we are sensitive to the severity of the impact of the trial court's March 2 Order upon petitioner GAC. Accordingly, the Government of Canada also wishes to express its concern that the trial court, in premising its default judgment upon non-production resulting from Canada's insistence that its laws be observed, imposed unwarranted hardship upon a private party. This action conflicts with *Societe Internationale* v. *Rogers,* 357 U.S. 197 (1958) (dismissal improper), and *In Re Westinghouse Electric Corp. Uranium Contracts Litigation,* 563 F.2d 992 (10th Cir. 1977) (contempt and fine improper).

CONCLUSION

The New Mexico courts committed grave error in failing to give proper consideration to Canada's laws and in imposing sanctions upon a party which was unable to produce documents without causing a contravention of these laws. We urge this Court to review this case and to uphold accepted principles of international comity.

Respectfully submitted,

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April 17, 1978

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1236
No. 77-1269

GENERAL ATOMIC COMPANY,

Petitioner,

against

EDWIN L. FELTER, etc., *et al.*,

Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENT INDIANA & MICHIGAN ELECTRIC COMPANY IN RESPONSE TO BRIEF OF GOVERNMENT OF CANADA AS AMICUS CURIAE

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April 24, 1978

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Indiana & Michigan Electric Company ("I&M") submits this brief in response to the Brief of Government of Canada as Amicus Curiae, filed with the consent of all parties on April 17, 1978.

Argument

The brief submitted by the Amicus Curiae erroneously assumes that the trial court directed General Atomic Company ("GAC") to disregard the laws of Canada and imposed sanctions for refusal to do so, but this is a mistaken assumption. The actual facts are as follows:

1. No outstanding order requires production of documents which are in Canada. The trial court's order dated November 18, 1977, which GAC presented for extraordinary review by the New Mexico Supreme Court on January 5, and February 20, 1978, did not require GAC to "produce documents located in Canada" (A. Br. 1)[1]; therefore the state supreme court's refusal of review did not "continu[e] in effect" (*id.*) any such order. The November 18, 1977 order (Pet. 1236, 2a-5a), rather, required identification of documents in Canada. It was entered on a Rule 37 motion after GAC failed to comply with a previous order, dated October 11, 1977 (*id.* 28a-32a), which required GAC to produce documents in Canada "[i]nsofar as it is lawful so to do" and to make a "diligent and good faith effort" to secure a waiver of any legal obstacles to production (*id.* 32a, 33a). GAC did not seek review of the October 11 order in the state supreme court. GAC's noncompliance with the direction in the October 11 order to "take affirmative action and to exert all lawful effort reasonable and possible to bring about the production" of documents located in Canada (Pet. 1236, 31a; UNC Cert. Br. 13a) was one of the grounds for the Sanctions Order and Default Judgment entered by the trial court on March 2, 1978 (and amended since), but that order is not final and has not been reviewed by the state supreme court. In light of this sanctions order, both the October 11 and November 18, 1977 orders would appear to have become moot.

1. Citations to the Brief of the Amicus Curiae are in the form "A. Br.". Citations to the petitions for certiorari are in the form "Pet. 1236" and "Pet. 1269". Citations to the brief in opposition to certiorari of United Nuclear Corporation ("UNC") are in the form "UNC Cert. Br."

2. The trial court's sanctions order, which is not properly before this Court,[2] was not based upon GAC's "failure to produce" (A. Br. 2) documents in violation of Canadian law, nor upon "Canada's proper enforcement of its Information Regulations" (*id.* 11). Neither did the trial court use GAC's compliance with Canadian law "as the basis for its fact findings" (*id.*). Rather, it explicitly based the sanctions it imposed upon GAC's history of willful discovery misconduct, including withholding documents located in the United States and failing to answer interrogatories in good faith (see Recitals 1-24, UNC Cert. Br. 3a-11a).

3. The trial court did not question the authority of Canada to prohibit disclosure of documents lodged within its borders, did not weigh the interests protected by the Canadian regulations against those served by American laws, and did not attempt to compel GAC to choose between obedience to Canadian or American law. At the same time it rightly required GAC to demonstrate the scope of supposed Canadian-law restrictions preventing discovery, and its findings of bad faith may well have been buttressed by GAC's shortcomings in this regard.

4. GAC's conduct with respect to the Canadian documents which, *inter alia*, justified sanctions consisted of (a) GAC's refusal without excuse to identify the Canadian documents (Recitals 25-30, UNC Cert. Br. 11a-13a), (b) GAC's failure to seek in good faith the lawful release of the documents (Recitals 31-35, UNC Cert. Br. 13a-14a), and (c) the deliberate policy of Gulf Oil Corporation ("Gulf") of housing evidence of the uranium cartel in

2. The trial court's sanctions order was entered after the decisions of the New Mexico Supreme Court sought to be reviewed herein, involved far different issues of fact and law, and is not final. Moreover, no justification is advanced for review by common-law certiorari. See Brief of Respondent Indiana & Michigan Electric Company in Opposition, at 24-26.

Canada to prevent its disclosure (Recitals 36-40, UNC Cert. Br. 15a).

The trial court in no way penalized GAC for acts of Canadian officials, nor did it adjudicate the legality of such officials' conduct. It clearly made no "unwarranted determinations regarding Canadian government activity and decisions" (A. Br. 11), since it made no such determinations at all. It imposed Rule 37 sanctions upon a recalcitrant party which was a United States domiciliary and over which it had *in personam* jurisdiction.

The trial court's recitals of fact concerning GAC's misconduct with respect to Canadian discovery were well-founded:

A. As to GAC's refusal to identify documents: GAC did not establish that identification of the documents was forbidden by Canadian law. Ordinarily under Canadian law (as under the standard practice in the United States) a party withholding documents from discovery must identify the items.[3] GAC furnished only ambiguous letters by a Canadian official, apparently not a lawyer, stating that production and identification of documents are not allowed (Pet. 1236, 37a-38a),[4] but it is agreed that this official has

3. Canadian rules of practice require identification of documents withheld during discovery, Federal Court Rules, Canada Gazette Part II, vol. 105, No. 5, SOR/71-68, P.C. 1971-270, February 9, 1971, and the security regulations, which do not refer to such idenfication, may be assumed to have been drafted with awareness of such practice.

Such identification of withheld documents is conventional in United States courts. *See, e.g.*, In re *Westinghouse Electric Corporation Uranium Contracts Litigation*, 70 F.R.D. 47 (W.D. Pa. 1977); *Sperry Rand Corp.* v. *International Business Machines Corp.*, 45 F.R.D. 287 (D. Del. 1968).

4. Moreover, the Canadian official in the letter cited was referring to identification "in the manner described" in GAC's letter (Pet. 1236, 38a), in which letter GAC had sought leave to provide a "summary of contents" (*id.* 36a) of each document. The "identification" directed in the November 18, 1977 order expressly excluded such a summary of contents (*id.* 3a). Its impermissibility has not been demonstrated.

no authority to waive or construe the regulations (Pet. 1269, 48a), and the Canadian government has stated that

> "The interpretation of the Regulations, including a determination of their scope, is a matter for Canadian courts." Diplomatic Note 116, 3/15/78, at 3.

The contentions of some Canadian officials that mere identification is prohibited (*id.*) have not been confirmed by any court (Pet. 1269, at 46a). The Legal Adviser to the Department of Energy, Mines and Resources emphasized to GAC the need for a judicial ruling (*id.* 46a, 49a), but GAC, whose duty it was to make disclosure, never sought such a ruling, although it was urged to do so by I&M (I&M Memorandum, 12/21/77, at 4).[5]

B. As to GAC's efforts to produce documents: GAC merely sought by letter a ministerial waiver to permit it to produce documents or identify them by, *inter alia*, summarizing their contents (Pet. 1236, 34a-36a). Its request was turned down (*id.* 37a-38a), and the minister no longer has the power to waive (*id.* 41a). On such showing GAC refused to produce any documents that are in Canada or to provide any information known to GAC or Gulf employees in Canada. No reasonable reading of the regulations justifies such position. The regulations only cover documents concerning discussions in the 1972-75 period; the request for production and GAC's refusal were not so limited.

5. The suggestion (A. Br. 4 n.4) that letters rogatory should have been employed by other parties proposes a needless exercise in futility. It was GAC's duty to comply with the outstanding discovery requests; it was not the duty of UNC or I&M to pursue GAC's documents by alternative routes. This Court did not suggest in *Société Internationale* v. *Rogers*, 357 U.S. 197 (1958), that American litigants were required to seek assistance from foreign courts to secure evidence abroad. There was no need to do so there or in this case, because the party controlling the evidence was before the United States court.

Moreover, the Canadian government has told GAC's counsel that nondocumentary evidence, such as facts known to employees, may lawfully be disclosed (Pet. 1269, 47a). GAC has provided neither a decision of a Canadian court nor an opinion of a Canadian lawyer sustaining its extreme position, and the trial court correctly concluded that no diligent and good-faith effort to provide discovery had been made.

C. As to concealment of documents in Canada to prevent disclosure: At a hearing on November 14, 1977 GAC was confronted with deposition evidence that Gulf's employees, at the direction of antitrust counsel, kept uranium cartel evidence in Canada to prevent disclosure in American judicial proceedings. GAC never rebutted this evidence, its trial counsel apparently conceded the point (Trial Tr. 11/14/77, at 11-72 through 11-75), and Gulf's attorneys later confirmed the fact (Affidavit of Frank J. O'Hara, sworn to Feb. 7, 1978; Affidavit of Roger K. Allen, sworn to Feb. 7, 1978). Such uncontradicted evidence fully supported the finding that any present-day problems in producing documents were of Gulf's own making, quite inconsistent with any claim of good faith in discovery. The trial court found that "Gulf's action in regard to storing cartel documents in Canada amounts to deliberately courting or seeking legal impediments to the production of the records" (Recital 40, UNC Cert. Br. 15a). This Court has recognized that such misconduct has "a vital bearing on justification for" the most severe sanctions. *Société Internationale* v. *Rogers*, 357 U.S. 197, 208-09 (1958).

It is beyond dispute that an American court may require a party subject to its jurisdiction to make discovery from abroad; *Société, supra; United States* v. *First National City Bank*, 396 F.2d 897 (2 Cir. 1968). The trial court did not depart from the cases, cited by Amicus Curiae (A. Br. 7n.12, 8n.13), involving the propriety of sanctions when disclosure is prohibited by foreign law. In accord with those cases the trial court inquired only whether Canadian law created an actual "inability to comply", *Société, supra*, 357 U.S. at 212, with discovery demands. It may have had insufficient aid in this from GAC (Pet. 1236, 45a), but its sanctions expressly do *not* rest upon, nor do they discourage, GAC's compliance with Canadian law. The trial court specifically told GAC *not* to violate Canadian law (Pet. 1236, 31a-33a; 45a-46a). Thus, the case raises no issue of conflicting legal obligations.

Decisions concerning possible sanctions for failure to make discovery prohibited by foreign law are therefore not apposite, but we do not wish to acquiesce in an erroneous reading of such cases (A. Br. 9). It is not the rule that a court must vacate a discovery order in such a case. To the contrary, legal excuses for noncompliance should be heard when sanctions are considered. *Société, supra*, 357 U.S. at 204-06; *see also* In re *Westinghouse Electric Corporation Uranium Contracts Litigation*, 563 F.2d 992, 997 (10 Cir. 1977).[6] Thus, whether Canadian law bars any action

6. *First National City Bank* v. *Internal Revenue Service*, 271 F.2d 616, 620 (2 Cir. 1959), *cert. denied*, 361 U.S. 948 (1960), likewise holds that supposed foreign law barriers will not be explored on motion to vacate a subpoena but rather in proceedings to punish for contempt. *Federal Maritime Commission* v. *De Smedt*, 268 F. Supp. 972 (S.D.N.Y. 1967), was a decision on just such a contempt motion after the subpoenas had been sustained on appeal, 366 F.2d 464 (2 Cir.), *cert. denied*, 385 U.S. 974 (1966). In *Application of Chase Manhattan Bank*, 297 F.2d 611, 613 (2 Cir. 1962), the challenged subpoena was left outstanding despite possible foreign-law obstacles. *Ings* v. *Ferguson*, 282 F.2d 149, 153 (2 Cir. 1960), seems at variance with later holdings, but states, in any event, that after clarification of Canadian law a subpoena may still be employed. Recent Second Circuit precedents adjudicate foreign-law issues in considering punishment for contempt—not on motion to quash—even where disclosure from a third party is sought. *United States* v. *First National City Bank*, 396 F.2d 897 (2 Cir. 1968). *Accord*, In re *Westinghouse Electric Corporation Uranium Contracts Litigation*, *supra*.

directed by the November 18, 1977 order is properly considered only on a review of the sanctions imposed upon GAC, and not on the examination which GAC seeks now of the order alone, especially since GAC has not challenged the trial court's findings of misconduct at this stage. Moreover, cases concerning the question whether a third-party witness may fairly or usefully be subjected to sanctions are also not pertinent (A. Br. 7-8), since a just result in the principal dispute often cannot be achieved by such sanctions. The issue here is different, *viz.*, which adversary party should suffer from nondisclosure of relevant evidence, when one party acted in bad faith. Nor is it the only purpose of a foreign-documents discovery order to "facilitate clarification of foreign law" (A. Br. 7n. 12), although that is one useful function. Here GAC sought no such clarification. It never even objected to discovery on Canadian-law grounds, and when its patent nondisclosure drew fire, GAC, in bad faith, merely advanced an exaggerated construction of Canadian law. Such conduct has correctly been made the subject of sanctions. *See United States* v. *First National City Bank*, 396 F.2d 897, 900n. 8, 905 (2 Cir. 1968).

Moreover, GAC's misconduct went well beyond its misbehavior under the purported shield of foreign law and encompassed repeated refusals to make discovery in good faith and without evasion. Given GAC's refusal to produce Canadian documents, the entire burden of discovery fell to interrogatories, and when good-faith answers were not forthcoming discovery was effectively aborted. The trial court concluded that a fair trial had been prevented by GAC and correctly held it in default. *See, e.g., National Hockey League* v. *Metropolitan Hockey Club*, 427 U.S. 639 (1976); *cf. Ohio* v. *Arthur Andersen & Co.* ____ F.2d ____, No. 77-1571 (10 Cir. Feb. 9, 1978).

There is no need to embark upon a theoretical discussion of the question (suggested by the Amicus, A. Br. 11) whether administration of justice in an American court should be ranked above or below Canada's interest in secrecy of uranium cartel evidence. This case involves no denigration of Canada's sovereignty. There has been no violation of Canadian law, the Canadian documents have not been produced, and no order currently requires their production. Both countries' interests are preserved, and Canada's concern over the sanctions order is misplaced.[7] GAC and Gulf have been held to be subject to Rule 37 sanctions, not for refusing to violate Canadian regulations, but for, *inter alia*, abusing the Canadian regulations in bad faith to shield a conspiracy to violate United States laws and to injure United States companies, and to mask their deliberate refusal to provide non-evasive, good-faith discovery.

The evidence of GAC's bad faith in discovery is essential to any review or discussion of the trial court's sanctions order. The absence of that evidence from the present record and GAC's present unwillingness to challenge here the trial court's recitals of fact underscore the inappropriateness of review at this stage.

CONCLUSION

Nothing in the decisions below warrants the concern of the Canadian government nor requires review by this Court. The actions of the trial court will be scrutinized in detail on the forthcoming appeals to the highest court of New Mexico. Thereafter, there will be ample opportunity

7. Notably, the Canadian government takes no position on the merits of GAC's broad claims that the trial court improperly interfered with foreign relations or offended the act of state doctrine (A. Br. 2n. 1).

to consider whether review in this Court is appropriate. None of the traditional grounds for review exists in this case, and the brief of the Amicus Curiae raises no issues worthy of examination at this time. The petitions should be denied.

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